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Supreme Court of the United States

OCTOBER TERM, 1961

No. 255

UNITED STATES, PETITIONER

vs.

DON GILMORE, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

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[fol. A]

IN THE UNITED STATES COURT OF CLAIMS

No. 374-58

DON GILMORE and SUE GILMORE, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed August 19, 1958

To the Honorable, the United States Court of Claims:

1. Plaintiffs are husband and wife, citizens and residents of California. They were married prior to December 31, 1955, and have remained husband and wife thereafter.

2. On or before March 15, 1954, plaintiff Don Gilmore filed his individual income tax return for the taxable year 1953 with the District Director of Internal Revenue at San Francisco, California, showing a tax liability of $18,209.86, and paid said tax to defendant.

3. On or before April 15, 1955, plaintiff Don Gilmore filed his individual income tax return for the taxable year 1954 with the District Director of Internal Revenue at San Francisco, California, showing a tax liability of $7,097.83, and paid said tax to defendant.

4. On or before April 15, 1956, plaintiffs filed their joint income tax return for the taxable year 1955 with the District Director of Internal Revenue at San Francisco, California, showing a tax liability of $10,137.52, and paid said tax to defendant.

[fol. B] 5. On or about January 8, 1958, the Commissioner of Internal Revenue assessed deficiencies in income taxes against plaintiff Don Gilmore as follows:

Taxable Year	*Taxes*	*Interest*	*Total*
1953	$18,883.26	$4,154.32	$23,037.58
1954	$ 3,762.21	$ 583.12	$ 4,345.33

6. Plaintiff Don Gilmore paid all of said deficiency assessments of income taxes to defendant on November 15, 1957, and paid all of said deficiency assessments of interest to defendant on November 27, 1957.

7. Of the aforesaid income taxes and interest, the following amounts were erroneously and illegally assessed and collected:

Taxpayer	*Taxable Year*	*Amount*
Don Gilmore	1953	$29,960.08
Don Gilmore	1954	$ 4,345.33
Don and Sue Gilmore	1955	$ 8,082.36
		$42,387.77

8. On February 11, 1958, plaintiffs filed their respective claims for refund of the aforesaid overpayments of income taxes with the District Director of Internal Revenue at San Francisco, California, in the form of Exhibits A, B and C attached to this complaint, which are incorporated herein by reference. More than six months have elapsed since the filing of said claims, and defendant has not allowed them, nor has any part thereof been paid to plaintiffs.

9. This court has jurisdiction of these claims under § 1491, Title 28, U. S. Code.

10. No other action has been taken or had on the aforesaid claims in Congress or by any of the Departments of defendant or in any other judicial proceeding. Plaintiffs are the owners of said claims and have made no assignment or transfer thereof, or of any portion or part thereof or interest therein, and they are respectively entitled to the full amounts claimed in said claims.

[fol. C] WHEREFORE, plaintiffs pray that this court render its judgment against defendant, for plaintiff Don Gilmore in the amount of $34,305.41, and for both plaintiffs in the amount of $8,082.36, all with interest as provided by law, and for plaintiffs' costs.

Respectfully submitted,

/s/ Eli Freed
ELI FREED
1069 Mills Building
San Francisco 4, California
DOuglas 2-3502

Attorneys for Plaintiffs.

FREED & FREED
1069 Mills Building
San Francisco 4, California
Of Counsel.

[fol. D] **EXHIBIT A TO PETITION**

FORM 843
REV. JAN. 1955

U. S. TREASURY DEPARTMENT — INTERNAL REVENUE SERVICE

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

District Director's Stamp (Date received)

RECEIVED
FEB 11 1958
Dist Director
Int Rev
San Francisco
(34)

The District Director will indicate in the block below the kind of claim filed and fill in, where required.

X Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps
Don Gilmore

Number and street
12 Crest Road

City, town, postal zone, State
Belvedere, California

1. District in which return (if any) was filed
San Francisco, California

2. Name and address shown on return, if different from above
645 Watkins Street, Hayward, California

3. Period - If for tax reported on annual basis, prepare separate form for each taxable year
From January 1 1953. To December 31 1953

4. Kind of tax
Income

5. Amount of assessment
$6,366.44

Dates of payment
Various dates during taxable year, and Nov. 15 & 27, 1957

6. Date stamps were purchased from the Government
----

7. Amount to be refunded
$29,960.08 with int., as plus such addi-

8. Amount to be abated (not applicable to income, estate, or gift taxes)
tional amount as may be found due to taxpayer

9. The claimant believes that this claim should be allowed for the following reasons

See attached sheet

Use reverse if space is not sufficient.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed: Don Gilmore

Dated 2/6, 1958

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[fol. E]

DON.GILMORE - FORM [illegible] - TAX YEAR [illegible]

Line [illegible]: Reasons for allowing the claim.

1. [illegible]% of expenses for legal fees of taxpayer's attorneys, and of other costs in divorce proceedings (except fees paid to attorneys for Dixie Gilmore), were incurred and paid during the taxable year for the conservation of the taxpayer's income-producing property. They are therefore deductible expenses. They were erroneously treated by the Commissioner as personal expenditures.

2. The Commissioner has erroneously credited to Dixie Gilmore, and refused to credit to the taxpayer, amounts of income tax withheld from the taxpayer's salary by his employer and which were deposited by taxpayer's employer to the taxpayer's credit with the District Director of Internal Revenue.

3. The Commissioner has erroneously allocated to Dixie Gilmore, and refused to allow as a deduction from the taxpayer's gross income, income taxes paid to the State of California by the taxpayer for his account and not for that of Dixie Gilmore, in the amount of $1,8[illegible].17.

4. The Commissioner has erroneously credited to Dixie Gilmore, and disallowed as an expense of the taxpayer, amounts of unemployment insurance tax paid for the taxpayer's account to the State of California. These amounts were expenses of the taxpayer and were not paid for or expenses of Dixie Gilmore.

[fol. F] EXHIBIT B TO PETITION

FORM 843 REV. JAN. 1955	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE **CLAIM** TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID	District Director's Stamp (Date received) RECEIVED Dist Director Int Rev San Francisco (34) Feb 11 1958

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

[X] Refund of Taxes Illegally, Erroneously, or Excessively Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps: Don Gilmore

Number and street: 12 Crest Road

City, town, postal zone, State: Belvedere, California

1. District in which return (if any) was filed	2. Name and address shown on return, if different from above
San Francisco, California	645 Watkins Street, Hayward, California

3. Period - If for tax reported on annual basis, prepare separate form for each taxable year	4. Kind of tax
From January 1 1954 To December 31 1954	Income

5. Amount of assessment	Dates of payment	6. Amount to be abated (not applicable to income, estate, or gift taxes)
$ 11,443.16	Various dates during taxable year and November 15, 1957 and November 27, 1957	

8. Date stamps were purchased from the Government	7. Amount to be refunded	
	$4,345.33 with int., plus such additional amount as may be found due to taxpayer	

9. The claimant believes that this claim should be allowed for the following reasons:

80% of expenses for legal fees of taxpayer's attorneys, and of other costs in divorce proceedings, were incurred for the conservation of the taxpayer's income-producing property. They are therefore deductible. They were erroneously treated by the Commissioner as personal expenditures.

Use reverse if space is not sufficient.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed [signature]
Don Gilmore

Dated [illegible], 19[illegible]

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[fol. G] EXHIBIT C TO PETITION

Form 843
Rev. Jan. 1955

DEPARTMENT OF THE TREASURY — INTERNAL REVENUE SERVICE

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

(District Director's Stamp (Date received))

RECEIVED
FEB 11 1958
DIST DIRECTOR
INT REV
SAN FRANCISCO
(34)

The District Director will indicate in the block below the kind of claim, and fill in, where required.

X Refund of Taxes Illegally, Erroneously, or Excessively Collected

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess

Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps
Don and Sue Gilmore

Number and street
12 Crest Road

City, town, postal zone, and State
Belvedere, California

1. District in which return (if any) was filed
San Francisco, California

2. Name and address shown on return if different from above
645 Watkins Street, Hayward, California

3. Period - If tax reported on annual basis, prepare separate form for each taxable year
From January 1 1955 To December 31 1955

4. Kind of tax
Income

5. Amount of assessment
$10,137.52

Dates of payment
Various dates during taxable year.

7. Date stamps were purchased from the Government
---

8. Amount to be refunded
$8,082.36 with int., x plus such addi-

9. Amount to be abated (not applicable to income, estate, or gift taxes)
tional amt. as may be found x due to taxpayers

9. The claimant believes that this claim should be allowed for the following reasons: Don Gilmore was previously married to Dixie Gilmore, and this marriage was dissolved by a final decree of divorce effective Oct. 25, 1955. Wages, etc. paid to Don Gilmore between Jan. 1 and Oct. 25, 1955, were community income of Don Gilmore and Dixie Gilmore, of which one-half is taxable to Dixie Gilmore. The present taxpayers, Don and Sue Gilmore, erroneously reported all of such income as their community income, and are filing this claim to eliminate from their gross income the portion thereof which is taxable to Dixie Gilmore. (Computation attached.)

Use reverse if space is not sufficient.

I declare under the penalties of perjury that this claim, including any accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is true and correct.

Signed Don Gilmore
Sue Gilmore

Dated 1958

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent in behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual, and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be furnished with the claim to show the authority of the executor, administrator or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[fol. H]

Don Gilmore
ors: Fulton St, Hayward California

1955

Income from Salaries

Employer	Total Salary	Total Salary not withheld
Don Gilmore San Francisco	20,583.29	7,583.29
Don Gilmore, Hayward	10,800.00	6,120.00
Don Gilmore, Riverside	3,600.00	3,600.00
Excess F.I.C.A. Tax		168.00
	34,983.29	17,471.29

	Total	Salary prior to 10-25-55	Salary after 10-25-55
Don Gilmore San Francisco	20,583.29	20,583.29	—
Don Gilmore, Hayward	10,800.00	7,729.03	3,070.97
Don Gilmore, Riverside	3,600.00	2,600.00	1,000.00
	34,983.29	30,912.32	4,070.97

½ to wife Gilmore *

Add
Total to Don Gilmore

* Final decree of divorce from Doris Gilmore, former spouse, was effective Oct. 25, 1955

[fol. 4] IN THE
UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed October 17, 1958

The defendant, the United States of America, by its attorney, Charles K. Rice, Assistant Attorney General, for its answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1.

2. Admits that on March 15, 1954, plaintiff Don Gilmore filed with the District Director at San Francisco an individual income tax return for 1953 showing a tax of $18,209.86, and that with the return he made a tax payment of $3,566.86. Defendant also admits that on the return he claimed a withholding credit for the balance of the tax shown to be due. Defendant denies the remaining allegations of paragraph 2.

[fol. 5] 3. Admits the allegations of paragraph 3.

4. Admits that on April 15, 1956, plaintiffs filed with the District Director at San Francisco a joint income tax return for 1955 showing a tax of $10,137.52 and claiming a withholding credit and estimated tax payments totaling $22,203.21. Defendant denies the remaining allegations of paragraph 4.

5-6. Admits the allegations of paragraphs 5 and 6, except defendant alleges that assessed deficiencies were paid on January 30, 1958, instead of November 15, 1957, as alleged in paragraph 6.

7. Denies the allegations of paragraph 7.

8. Admits the allegations of paragraph 8, but denies all statements made in the claims for refund not otherwise expressly admitted herein, and denies there were any overpayments of tax.

9-10. Admits the allegations of paragraph 9 and 10, but denies that defendant is indebted to either or both plaintiffs in any amount.

WHEREFORE, defendant having fully answered plaintiffs' petition prays that they take nothing in this suit, that the petition be dismissed, and that defendant be allowed its costs herein.

CHARLES K. RICE,
Assistant Attorney General

THEODORE D. PEYSER,
Attorney.

[fol. K] IN THE
UNITED STATES COURT OF CLAIMS

No. 374-58

DON GILMORE and SUE GILMORE, PLAINTIFFS

THE UNITED STATES, DEFENDANT

TRANSCRIPT OF PROCEEDINGS OF OCTOBER 26-27, 1959

San Francisco, California

• • • •

Present:

Honorable Wilson Cowen, Commissioner

APPEARANCES

Eli Freed, Esquire, and Kurt W. Melchior, Esquire, Counsel for Plaintiffs

Benjamin H. Pester, Esquire, Counsel for Defendant

• • • •

[fol. 1] Monday, October 26, 1959—10:00 A.M.

Testimony for Plaintiffs

The parties met, pursuant to notice of the Commissioner, at the time above stated, in Room 59, Federal Office Building, San Francisco, California.

Present: Honorable Wilson Cowen, Commissioner; Eli Freed, Esquire, and Kurt W. Melchior, Esquire, counsel for plaintiffs; and Benjamin H. Pester, Esquire, counsel for defendant.

Mr. Holmes Christian, a Certified Shorthand Reporter, was thereupon sworn by the Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of him by the Commissioner.

Pursuant to the order of reference by the Honorable, the United States Court of Claims, in the above-entitled

cause, testimony on behalf of the plaintiffs was taken as follows:

[fols. 2-3]

[fol. 4] STATEMENT BY MR. FREED

MR. FREED: Your Honor, I think that since the Petition and the Answer don't shed much light on the story, it might be appropriate for me to briefly indicate and outline just what this is about.

THE COMMISSIONER: Yes. I read your claims for [fol. 5] refund. They are considerably more helpful to show what your claim really is, Mr. Freed, but you might make a brief statement to show specifically what you consider the issue here to be.

MR. FREED: We are in California, and in California we have our peculiar Community Property rules, which are so much unlike that of rules pertaining to income and property of other states. I think I might dwell on that.

THE COMMISSIONER: Are they similar to those of my home state of Texas? If they are, I know a little bit about the Community Property law.

MR. FREED: That is very fortunate. They are somewhat similar, but I don't know in which respects they may differ.

The petitioner here and Dixie Gilmore were married, and we have stipulated on that, in Nevada on March 2nd, 1946. That was just the place of marriage. They were actually thereafter residents of California.

Mr. Gilmore, before his marriage, was an automobile dealer, and after his marriage continued to be in that business. He had three places of business, and I should mention the fact that these three places of business were all operated as separate corporations. One place of business was in San Francisco, known as Don Gilmore, San Francisco, a Chevrolet dealership, a California corporation. There was another dealership in Hayward, which is about 20 miles or so from here, as you probably know, Don Gilmore, Hayward, a separate corporation. That was a Chevrolet dealership too. There was another

[fol. 6] dealership in Riverside, not far from Los Angeles, which is a Pontiac dealership.

Mr. Gilmore owned all of the stock of the corporation which owned and operated the Chevrolet dealership in San Francisco. He owned 60% of the issued stock of the corporation which operated the Chevrolet dealership in Hayward. He owned somewhat in excess of 70% of the stock of the corporation which owned and operated the Pontiac dealership in Riverside.

In 1952 Mr. Gilmore's wife, Dixie Gilmore, after that period of marriage, about six years, while they were living together in Belvedere, across the Bay, filed a complaint for divorce against Don Gilmore on the grounds of extreme cruelty.

Several months later she amended that complaint to add an additional ground for divorce, namely, adultery.

Under the California rules, all property acquired by husband and wife after marriage is presumed to be community property. However, all property owned by the husband or the wife before marriage and all rents, issues and profits thereof after marriage continue to be separate property. Generally speaking, all income produced by either spouse as a result of their efforts, their work—"efforts" may be intellectual or physical—is generally speaking community income, and in California we have the peculiar situation which often exists that when the husband expends efforts in reference to property which he owns before marriage, separate property, there often accrues or accumulates or is added to that separate [fol. 7] property community property.

After a period of marriage there often exists the situation where property can be partly separate and partly community, unlike in other states. Usually it is regarded as an encumbrance on separate property. Here they have the characteristics of both, separate and community.

In a divorce case on the grounds of adultery or extreme cruelty, or both, as was the situation here, under our California rules the Court in dissolving the marriage is also required to dissolve the community property, partition it or dissolve it, and is required to give more than 50% of the community property to the innocent party.

In this Gilmore case that was one of the considerations; namely, if one of the spouses was declared to be innocent—and I might mention that under our rules the Court has the power to grant both parties a divorce, either or both, and in which case, if they both get the divorce the community is divided equally, but otherwise the innocent party gets more than 50%, is entitled to more than 50% of the community property.

I might, for the purpose of this, say that all of the income-producing property that existed in the marriage of Don Gilmore and Dixie Gilmore consisted of the investments in these three automobile dealerships, and—

THE COMMISSIONER: Stock ownership?

MR. FREED: Stock ownership, yes. The other in- [fol. 8] come—that is the only income-producing property—the community income in this situation was realized by Don Gilmore from the salaries which he received for his services from the three corporations.

THE COMMISSIONER: He was an officer of all three?

MR. FREED: President and managing officer of all three.

There is some slight income that will be referred to in a stipulation which we expect to file here. It is very small, and I think that it is not an exaggeration to say that all of the income-producing property was the investments in those three corporations.

The claim that was made by Dixie Gilmore, as will appear in the testimony, was that the investments of Don Gilmore in these three automobile dealerships had appreciated, had grown very substantially in value, from the time of marriage to the time of the filing of the complaint. I think it was an appreciation in the neighborhood of about $600,000, and the claim was made by her, as I understand it, that she was entitled to all, or in any event at least one-half, of that interest, and the investments in those three corporations.

That was denied and resisted by Don Gilmore, who, on the other hand, claimed that there was no community property whatsoever in the marriage.

I might mention parenthetically also that we have the rule in California that with reference to all marital ex-

penditures, it is presumed the community property was [fol. 9] used first for all of those expenditures.

As I was saying, Don Gilmore claimed that the community was very substantially overdrawn; that the expenditures made by him and by his wife in the marriage far exceeded all of the community income that was realized during the marriage, so that there was no community property whatsoever left.

Dixie Gilmore, on the other hand, claimed that a rule should be applied that would result in holding that all of that appreciation, or at least one half, was community; the rule being that when there is separate property owned by the husband at the time of the marriage, during the period of marriage he is entitled to what would represent a fair return on that investment, and anything in excess of that fair return should be regarded as community property.

There are two rules here to deal with: the one that I just mentioned, the second one, and the first one which was advocated by Dixie Gilmore, and the other being advocated by Don Gilmore.

It is claimed by the petitioner here—it will be claimed, and he will try to prove so—that substantially all of the legal expenses that he incurred—.

THE COMMISSIONER: Yes, you say "80%".

MR. FREED: (Continuing)—in the defense—yes, we say 80%, but at least 90, and in fact I think if it were done all over again, after a study was made, it would probably be more than 80—but we expect to or we will [fol. 10] try to prove that substantially all of the legal expenses that were incurred by Mr. Gilmore were incurred to defend and protect his businesses, his investments, in those three corporations. If Dixie Gilmore, through her efforts, acquired a substantial or even a minor interest in those three corporations as her own, the General Motors Corporation with whom these three dealerships had agreements would be in a position to terminate the franchises or selling agreements on three months' notice.

We will offer evidence to that effect, and that there would be probable cause—we will try to show—for such termination, and that most likely would have resulted if

she had acquired through her efforts any of the stock in those three corporations.

We will also attempt to show here that that was almost the only consideration in the case as far as Mr. Gilmore was concerned. He had no real objections to a divorce. He thought there should be a divorce. There was no concern about alimony at all. He fully expected the Court to award alimony, which, by the way, the Court did, but finally discovered afterwards that the Court was in error and had to withdraw that award. That was a strange circumstance at the end of the trial of the case.

There was some joint tenancy property. There were two homes, one in which they lived in Belvedere, and another in which they had previously lived in Fairfax. Those two pieces of real property were vested in joint [fol. 11] tenancy in Don Gilmore and Dixie Gilmore as joint tenants. From our standpoint, and there at that time Mr. Gilmore recognized that she owned a half interest in those properties, so that was of no great concern to him either.

The Court will recognize that there is another petitioner here, Sue Gilmore. The final decree of divorce was entered on October 25, 1955, and shortly thereafter—I believe it was November 1st of that year—Don Gilmore married Sue Gilmore.

I forgot to mention, although it should appear somewhere, I think—

THE COMMISSIONER: I think it shows in your claim for refund, the last one.

MR. FREED: Yes. It happened, and I will mention that too, that the trial court, to everyone's surprise on Mr. Gilmore's side, awarded him the divorce. Under our procedure in California, upon awarding a divorce, the trial court enters an interlocutory decree.

THE COMMISSIONER: Yes, they have to wait a year before a final decree is effective?

MR. FREED: Yes. Dixie Gilmore did not accept that interlocutory decree; she took an appeal. An appeal was taken to the intermediate Appellate Court in California, the District Court of Appeal.

The District Court of Appeal reversed the trial court, and then, being dissatisfied with that, Don Gilmore peti-

tioned the Supreme Court, the highest Appellate Court, [fol. 12] for a hearing, and the hearing was granted.

The Supreme Court vacated the decision of the District Court of Appeal and affirmed the trial court. The result was that the trial court was finally affirmed, and on October 25, 1955, a final decree was entered.

The decision and opinion of the Supreme Court appears at volume 45, California Reports 2nd Series, page 142.

THE COMMISSIONER: Is that in the West system, also?

MR. FREED: That would be in the Pacific system.

THE COMMISSIONER: Do you have the Pacific citation convenient?

MR. FREED: Yes, we have it. It is 287 Pacific 2nd 769.

* * * *

[fols. 13-14] * * * *

[fol. 15] THE COMMISSIONER: All right. Whom will you have first, Mr. Freed?

MR. FREED: We have a witness who is due here at a quarter after ten.

MICHAEL L. HAUN, a witness produced on behalf of the plaintiffs, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: Will you give us your name for the record, Mr. Haun.

THE WITNESS: Michael L. Haun.

THE COMMISSIONER: Where do you reside, sir?

THE WITNESS: 1635 Gough Street, San Francisco, California.

THE COMMISSIONER: Mr. Freed, you may examine the witness.

DIRECT EXAMINATION

MR. FREED: Q. Mr. Haun, you are an attorney licensed to practice in all the courts of the State of California and have been for a number of years, have you not?

A. I have, since October the 15th, 1929.

Q. Mr. Gilmore has been a client of yours, has he, for many years—Don Gilmore?

A. Yes.

Q. You were also the attorney for the three automobile dealerships in which he was interested?

[fol. 16] A. That's correct.

Q. In 1952 were you engaged by Don Gilmore to represent him in a divorce action filed by Dixie Gilmore, his wife at that time?

A. I was.

Q. What did you proceed to do generally when you were engaged as counsel in that case?

A. Well, as I recall it, at the time he was served with a copy of the complaint and summons he was also served with an order to show cause and a notice of taking his deposition. I contacted opposing counsel, requested time, which was granted, and we discussed the matter from time to time.

Do you wish me to continue?

Q. Did you make a court appearance at that time?

A. Not until the suit was filed in April, the first part of April, 1952. I don't recall when the first court appearance was, but I believe the matters were continued until possibly June or somewhere around in there, on an order to show cause. That was the first court appearance for temporary support.

Q. Was Dixie Gilmore awarded some temporary alimony pending the action?

A. She was.

Q. Was that by a court order?

A. That was.

Q. I have here the Clerk's Transcript on Appeal. You have seen it, counsel?

[fol. 17] MR. PESTER: I have.

MR. FREED: Q. I will refer you to the Cerk's Minutes dated June 6, 1952, in which it appears that the Court ordered Don Gilmore to pay Dixie Gilmore $1,250 per month, pendente lite, and $1,500 counsel fees on account.

That was counsel fees for her counsel, was it not?

A. Yes, and that is the order and the hearing I just referred to.

Q. At that time you were associated with Walter F. Freitas, were you?

A. Correct.

Q. Walter Freitas was engaged by Mr. Gilmore to become associated with you?

A. I am sorry, I didn't hear the first part of your question.

Q. Walter Freitas is an attorney at law who was brought into the case—I will withdraw that and reframe the whole question. It has become messed up.

Walter Freitas is an attorney at law whose office is in San Rafael, Marin County?

A. Yes.

Q. Your office is in San Francisco, is it not?

A. That is correct.

Q. I have overlooked to mention in my opening statement that the action brought by Dixie Gilmore was in the Superior Court in Marin County, the county seat of that county being San Rafael?

[fol. 18] A. That is correct.

Q. Mr. Freitas has offices in San Rafael?

A. In San Rafael, and I understand his practice is almost exclusively in that county.

Q. He became associated with you, and he was engaged by Mr. Gilmore? That is how that came about; isn't that right?

A. That is correct.

Q. You and Mr. Freitas joined together in the filing of an Answer to the Complaint of Dixie Gilmore, and that was filed on June 16, 1952. That is correct, is it not?

A. I believe so; if the record so states.

Q. Prior to the time that you and Mr. Freitas prepared and filed an Answer to the Complaint—and I wish to add thereto that there is a Cross-complaint as part of that Answer that you and Mr. Freitas prepared and filed on behalf of Mr. Gilmore?

A. Yes.

Q. In which Mr. Gilmore charges Dixie Gilmore with extreme cruelty and asks for divorce?

A. Correct.

Q. Coming back again to the question I had in mind, prior to the time that the Answer and Cross-complaint

were filed, did you individually or jointly with Mr. Freitas carry on any negotiations for the settlement of this case with the attorneys for Dixie Gilmore?

A. We did.

[fol. 19] Q. Prior to that time had there been any attempts made at reconciliation of the parties?

A. Oh, I would say slight attempts, up to about May the 15th of 1952, at which time Mr. Gilmore left the premises.

A. The home where they had been residing.

Q. Do you remember what those attempts were? Did you participate in them, for example?

A. I participated in those talks with Mr. Charles A. Christin, alone. That was before Mr. Freitas came into the case.

Q. Christin was one of the attorneys for Dixie?

A. One of the attorneys for Mrs. Gilmore. He was the original attorney for Mrs. Gilmore. He filed the suit.

Within a very short time, or at least before the hearing of June the 6th, it was definitely determined that there was no possibility of a reconciliation.

Q. It was determined then, was it, that the marriage was finished?

A. No question of that.

• • • •

[fol. 20] Q. Let me put it to you this way, so we can be as objective about this as possible, if I may:

Were there any conversations between you and Mr. Gilmore after that date directed toward saving the marriage?

A. None after May the 15th, 1952.

Q. Did you receive any instructions whatsoever from Mr. Gilmore after that date to render any services towards saving the marriage?

A. No.

Q. What about Mr. Freitas? Were you ever present at any time when that matter was discussed, whether or not you or Mr. Freitas or both should render any services after that time that you just mentioned to save the marriage?

A. Not that I recall. I have a definite impression that after May the 15th, 1952, at the time he left the home, there was no possibility of saving this marriage.

[fol. 21] Q. Turning to the question of negotiations, did you individually or with Mr. Freitas carry on any negotiations with any of the attorneys for Dixie Gilmore toward the settlement of this controversy between Mr. and Mrs. Gilmore? That is, prior and up to the time that you filed an Answer and Cross-complaint which was in the middle of June, 1952.

A. I don't believe there were any negotiations prior to the filing of the Answer and Cross-complaint.

Q. Do you remember any negotiations after the filing of the Answer and Cross-complaint?

A. I do.

Q. Do you remember what they were, and, if so, would you relate them.

A. Well, my best recollection is that in the fall of 1952—I can't say the exact date, but there was a conference with a Mr. Gillen, who was then associated in the case, and at that conference, on behalf of Mrs. Gilmore, Mr. Gillen made a definite demand of one half of what he considered to be the community property of the parties, and arriving at that figure, as I recall, and I refreshed my memory by looking through my old files, roughly, he allowed Mr. Gilmore—well, I believe it was $240,000 as separate property before the marriage, and that that had increased to $800,000. Subtracting those two figures, he arrived at $540,000, of which he demanded one half, contending it was community property. In other words, demanding $270,000 by way of settlement, plus [fol. 22] attorney fees and court costs, and no alimony.

Q. Was the basis for that settlement advanced to you at that time by Mr. Gillen?

A. Well—

Q. I mean; specifically.

A. As I stated—

Q. What property was he referring to?

A. Well, he, I think, referred particularly to the San Francisco property, the increase in the value of the corporation.

Q. Which corporation?

A. Don Gilmore San Francisco.

THE COMMISSIONER: That was a Chevrolet dealership, was it, Mr. Haun?

THE WITNESS: That's correct.

MR. FREED: Q. You said "particularly." Was any reference made by him to the other dealerships, Hayward and Riverside?

A. That I can't recall, I am sorry. I can't answer that. I would only be assuming. There is a possibility they must have included the other two corporations.

Q. Do you remember what the legal basis was for his claim, Mr. Gillen's demand, of $270,000 as a settlement?

A. Well, as I previously testified, it was his contention that that was community property.

Q. What was community property?

A. There was a total community property of $640,000 [fol. 23] pardon me, 540,000. He was demanding one half of it.

• • • •

MR. FREED: Q. What was your response to that demand, Mr. Haun?

A. We thought it was entirely out of order.

Q. Did you make any offers at that time?

A. I don't recall that we did. We might have made some offer to pay her a reasonable amount for—oh, for a number of years, until such time as she could rehabilitate herself. So far as conveying any interest in any of the corporations, we did not consider that. We thought that the demand was entirely out of order.

Q. Did you have any discussions at that time about alimony?

A. I can't recall that too well. We might have countered with an offer of substantial, as I said, alimony payments for a period of time.

Q. That is what you were referring to?

A. Until such time as she would rehabilitate herself. As far as seriously considering the offer of $270,000, I personally thought that was entirely out of order.

Q. Did you report to Mr. Gilmore the negotiations that you had?

[fol. 24] A. I believe we did.

Q. Did Mr. Gilmore give you any instructions in regard to further negotiations?

A. No. I think he said something to the effect that "If that's their line of thinking, why, there isn't any chance about it. I haven't this kind of money. I couldn't raise it."

His connection with the Chevrolet people, he couldn't possibly have raised that kind of money had he so desired, even if he desired to settle it for that figure.

Q. Were there any negotiations after that with the attorneys for Mrs. Gilmore?

A. You mean for settlement?

Q. Yes.

A. Not that I recall, until after the case had been tried.

Q. The case went to trial, I think, March 13th, 1953—March 16, 1953?

A. You might have to lead me on those dates a little bit.

MR. FREED: We have a stipulation that we propose to offer in due course that contains those dates, so I will make reference to the stipulation from time to time.

Q. At the time you went to trial, you were associated with another attorney, Wallace S. Myers; is that correct?

A. That's correct.

Q. He was substituted, was he not, for Mr. Freitas?

A. Yes.

[fol. 25] Q. Mr. Freitas' active participation in the case with you ended about when? Do you remember?

A. In early January of '53.

Q. Did Mr. Myers come into it shortly after that time?

A. I would say within a week or so.

Q. Mr. Myers has his office in Marin County too, has he not?

A. That is correct.

Q. He is reputed to be a trial attorney, is he, in Marin County?

A. His reputation is very good as a trial attorney. I personally consider him the best trial attorney in Marin County, if I may say so.

Q. That is quite a compliment. The trial continued for a number of days, about 23 days or so, did it not?

A. Yes.

Q. During the course of that trial, what was your chief objective that you and Mr. Myers had?

A. Well, it was to naturally conserve the three corporations and to keep them whole, it being our contention that they were his separate property and that it was our job, we felt, to prove that to the Court if we could.

Q. You participated each and every day, did you not, with Mr. Myers in the trial of that case?

A. I did.

Q. Prior to the trial of that case, you and Mr. Myers made a certain amount of preparation for the trial?

[fol. 26] A. Yes, we did.

Q. Did you and Mr. Myers prepare it together?

A. Yes, we did.

Q. Did you know a Mr. Schwerin, an accountant?

A. I do. There might have been certain conferences that Mr. Myers had with witnesses separately, and which I might have had, but we were in contact with each other all the time, kept each other informed. Most of the conferences were together.

Q. What part did Mr. Schwerin play in the preparation for the trial of that case?

A. Well, he was called into the case to examine the books, the corporate books and the private accounts of Mr. Gilmore, primarily to determine what had happened to the earnings of the corporation, the payments that had been made to Mr. Gilmore, and primarily to determine whether or not there was any community property.

Q. Did you have any meetings with Mr. Schwerin?

A. We did, many meetings.

Q. Before the trial of the case commenced; is that correct?

A. Yes.

Q. What was the work that was done? How would you characterize the work that you did with Mr. Schwerin at those meetings?

A. Well, he would explain to us from time to time where money had gone, been paid to Mr. Gilmore, Mr.

Gilmore receiving a certain salary, and he would follow down what happened to that salary.

[fol. 27] There were times that Mr. Gilmore would borrow from the corporation and pay back. It was a rather complicated thing in an accounting proposition. It was something new to me, and it was to get some light on that particular phase of the case that we had these conferences.

Q. What were you trying to prove through Mr. Schwerin?

A. Well, as I said before, that the property, the corporation itself, including the increases, was the separate property of Mr. Gilmore; that any community property, being such property as had been acquired through his personal efforts, had been expended in support of the community, paying community debts, the traveling, what was used for traveling, their living expenses and so forth.

Q. In the defense of the case in behalf of Mr. Gilmore, and the prosecution of the Cross-complaint of Mr. Gilmore against Mrs. Gilmore, was there any concern on the part of you and Mr. Myers in respect to alimony?

A. Not particularly. Not so far as I was concerned. As I previously stated, we made an offer to pay her something for a period of time, and I felt sure that the Court would award her something along that line, temporarily. Mr. Gilmore was willing to do that. There was no question about that.

Q. Quite a bit of time was devoted in the trial of the case to the conduct of the parties, was it not, Mr. Haun?

A. Yes, I believe so. I believe the Transcript will [fol. 28] show that.

Q. So far as you were concerned, and so far as you know, having been associated with Mr. Myers—although we will call him as a witness to speak for himself—was there any relationship between your efforts and the trial of those matters which related to the conduct of the parties and the community property issues?

A. Do you mean as to the outcome? I don't quite understand.

Q. Yes, the outcome as far as your objectives were concerned.

A. Yes, I think we both felt that every bit of evidence that—

MR. PESTER: I am going to object to that, as to what they both felt. He may say what he felt.

THE COMMISSIONER: State what your feeling and effort was, Mr. Haun.

THE WITNESS: My effort was along that line. Since we had the testimony, I felt that it should be offered, everything should be brought before the Court. The Court possibly would find that she was the cause of this marriage failure, and that in the ultimate end, if it should find that this was community property, under the laws of California if it granted a divorce to Mr. Gilmore, it could still give him the community property. In other words, if he found that there was a certain interest in these three corporations.

MR. FREED: Q. Do you have anything to say with [fol. 29] reference to the power of the Court? Did you have that in mind in regard to the allocation of the community in the event one or the other received the divorce?

A. Well, yes. My understanding was and is that the prevailing party in a divorce action, in so far as community property is concerned, the Court must grant to the innocent party more than 50% of the community property, whether it is 51%, but it must be more, as I understand California law.

Q. Were you aware during your representation of Mr. Gilmore of the effect on the General Motors Corporation, both the Chevrolet Division and the Pontiac Division, of the acquisition by Dixie Gilmore of any interest in the stock of those corporations, and what effect it might have on the contractual relationship of General Motors Corporation and the three dealerships?

MR. PESTER: I am going to object to that on the ground that any effect that it might have on a contractual relationship with Mr. Gilmore and the corporation would be best evidenced by the agreement that they had between them.

THE COMMISSIONER: I think you have some direct evidence on this point anyway, don't you, Mr. Freed? Don't you have a witness that has some direct—

MR. FREED: Yes, and I want to establish for the record that Mr. Haun, having been the attorney for the three corporations as well as Mr. Gilmore, for a number of years, whether or not he was aware of the fact that [fol. 30] these three dealerships operated under a franchise of the General Motors Corporation, and what the effect might be under those franchises on the dealerships.

THE COMMISSIONER: I will sustain the objection as to what the effect might be, unless you show he has personal knowledge of it. I will permit you to prove by him that he knew of this franchise.

MR. FREED: I am trying to get about it, in a roundabout way, I suppose.

Q. Mr. Haun, did you have any knowledge of what the effect might be?

A. Yes, generally I did. At that time, particularly General Motors Corporation was very strict—

MR. PESTER: I am going to object for the same reason I gave before, and for the further reason that the question which was asked has been answered. This last statement that he is undertaking to make is a voluntary statement.

THE COMMISSIONER: Yes. He had personal knowledge. Now, let's take it from there. Go ahead, Mr. Freed.

MR. FREED: Q. What was your knowledge?

A. Well, generally I knew the contents of the franchise contracts. Not in particular, naturally. I can't say what would have happened, but I do know this: Generally, if Mr. Gilmore did not have complete control of those corporations, the chances were nine out of ten that he would lose the franchise very shortly, within a year at the most.

[fol. 31] Q. In respect to the conflicting claims of Mr. and Mrs. Gilmore in the community, what legal theory was advanced by Dixie Gilmore's counsel that there was in this case a substantial appreciation in the community; first that there was a substantial appreciation in value in the stock interests of Don Gilmore in the three automobile dealerships, and secondly that that appreciation consisted primarily of community property? Do you remember the theory that they advanced?

A. Yes.

Q. That they argued?

A. Yes. There was one line of cases in California that held that in such case one half of the appreciation would be community property, less a reasonable return for the investment. I think the rule is established, in certain cases, seven or eight percent that he would be entitled to as his original investment, plus a seven or eight percent of the increase, and the rest is held to be community property.

Q. What was the theory that you and Mr. Myers advanced and argued to the Court?

A. Our theory was that since it was his separate property originally, it continued to remain his separate property. If we could establish the fact that he had been amply paid for his services rendered to the corporation, such as his salaries from the various corporations, those salaries being community property. In other words, if the community had been amply paid for the services that had been rendered by him, we felt that [fol. 32] under another line of cases the Court would hold that the appreciation would also be separate property.

Q. What were you able to establish with respect to those salaries? Did you establish whether or not they were ample?

A. I believe we did. The Court so held, particularly in the findings of the lower Court, and ultimately in the holding of the Supreme Court of the State of California.

Q. Did you also establish whether or not any of those salaries went back into the investment, or whether they were fully spent?

A. We established that they were fully spent. As a matter of fact, as I recall it now, the community even owed his separate estate monies they had overspent.

MR. PESTER: If the Court please, I am going to object to this on the ground that it is not the best evidence.

THE COMMISSIONER: Doesn't all this show, Mr. Freed, in the findings made by both the trial court—

MR. PESTER: Yes, they would.

THE COMMISSIONER: (Continuing)—and on appeal?

MR. FREED: No, I don't believe it was shown that more money was spent in the marriage than the amount of his salaries. I believe the findings showed there was no community property. That is definite, and in the opinion of the Supreme Court that is affirmed.

MR. PESTER: I think whatever findings were established and found by the Court, the findings and the decree [fol. 33] are the best evidence, and this witness should not be permitted to testify.

THE COMMISSIONER: Yes, I will sustain the objection. However, he may show what efforts he rendered as an attorney on these various matters, what work he performed, what services he rendered.

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[fol. 34] MR. FREED: The Minutes of the Clerk of the Superior Court show that on April 24, 1953, the Court ordered $750 per month alimony for five years for Dixie Gilmore, to be terminated on death or remarriage, and the alimony to be reconsidered at the end of five years.

Do you remember that?

A. That is correct.

Q. Eventually, what happened to that award of ali-[fol. 35] mony to Dixie Gilmore? Do you remember?

A. Well, that was omitted from the findings, the ultimate findings and the ultimate judgment of the trial court.

Q. If there is no objection, would you explain—if your services were in relation to it—what happened that resulted in the final omission from the decree of any award of alimony to Dixie Gilmore.

A. Because under the California law at that time the trial court was powerless to award alimony to a guilty wife.

THE COMMISSIONER: Is that what you urged, Mr. Haun, before the trial court? Did you take that position as an attorney?

A. That position arose after the completion of the trial, yes, and on the preparation of the findings and the motions for new trial and so forth.

MR. FREED: Q. Who called that to the attention of the trial court? Was it you, or Mr. Myers, or someone else?

A. I am sorry. I believe we did, one or the other. Mr. Myers actually is the one that addressed the Court practically throughout the entire matter. Now, I might have made the legal research on it, or he might have.

Q. Was there any dispute over that rule that the spouse against whom the divorce is awarded under California law has no right to alimony?

A. I don't think so.

Q. In other words, there was no opposition to it; is [fol. 36] that what you are saying?

A. You mean by the attorney for—

Q. Yes, did they oppose the point or not?

A. Well, I believe they conceded it after reading the cases. It is settled law on the matter.

Q. Were the theories advanced by Dixie Gilmore's counsel and the efforts they made to establish that there were substantial community property interests in the stock of those three corporations regarded seriously by you?

A. I am sorry, Mr. Freed,—

THE COMMISSIONER: Will the Reporter read the question.

(Reporter read the last question)

A. Yes, they were.

MR. FREED: Q. Was there anything else in the case at all as serious as that?

A. My ears are getting bad.

Q. Was there anything else in the case as serious as that?

A. No.

Q. Aside from that, was there anything else in the case that was serious?

A. Well, in relation to what?

Q. The community interest, the assertion by Dixie Gilmore of substantial community interests in the stock of those three corporations, those three dealerships?

A. No. That, to me, was the entire case. As I meant to say, I lived with this thing for about three years, and [fol. 37] that was my sole hope and effort, everything extended towards that particular point.

Q. You rendered services on the appeal that was taken by Dixie Gilmore from the interlocutory decree of divorce, did you not?

A. Yes.

Q. There was a Brief that was filed on behalf of Dixie Gilmore, who was the appellant. That Brief is entitled "Appellant's Opening Brief in the District Court of Appeal." Do you remember such a Brief?

A. Yes.

Q. You and Mr. Myers joined together in filing a Respondent's Brief, did you not?

A. We did.

Q. You and Mrs. Myers jointly continued to render services throughout the Appellate stages of this proceeding?

A. We did.

Q. All the way through the Supreme Court?

A. Yes.

• • • • •

[fol. 38] MR. FREED: Q. What was your objective in respect to the services you rendered on appeal?

A. The same as they had been throughout the investigation and trial in the lower Court.

Q. Namely, what?

A. To establish the fact that there was no community property.

Q. In respect to this particular property?

A. Particularly the corporations. I think we conceded that the two homes were joint tenancy property.

Q. Mr. Haun, in the Briefs that were filed by both parties on appeal, and Petitions as well on appeal, there was considerable discussion regarding the conduct of the parties. Was your concern in respect to the conduct of the parties, as treated on appeal, any different from that concern which you had during the trial of the case?

A. I believe not.

Q. What was your concern?

A. The concern, as I previously stated, was that by bringing out those facts in the Briefs, it was our hope to establish and to have the Appellate Court affirm the

[fol. 39] lower Court, wherein it granted the divorce to Mr. Gilmore, which, naturally, as I previously stated, would preclude giving any of the community property to Mrs. Gilmore.

Q. I am not sure that it is clear in the record, Mr. Haun. What was the purpose for associating both Mr. Freitas and after that, Mr. Myers in the representation of Mr. Gilmore?

A. Well, in the first place, I felt that the case involved so many issues that it was what I considered more than a one man case. I felt that there should be at least two attorneys in this case. I didn't think that one man—I don't care how good he is—could handle this type of case as it should be. No. 2, I felt that Marin County counsel should be associated, because at that time I was not too well acquainted with the various workings of that particular county, the rules of the Superior Court and so forth.

Q. Mr. Haun, you received certain compensation, did you not, from Mr. Gilmore for your services?

A. I did.

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[fol. 40] Q. Were the amounts which you received from Mr. Gilmore for your services reasonable compensation for your services?

A. Yes, I would say very reasonable.

• • • •

[fol. 41] MR. FREED: Q. Are you able to say approximately what portion of your total services for which you received the fees in '53 and '54 were rendered for the defense and protection and preservation of Mr. Gilmore's interests in those three businesses?

A. I would say that a hundred percent of my services were rendered for that purpose, because after May the 15th there was no effort to save the marriage, and all I was concerned with was conserving these three corporations. That is to say, to prove, if possible, that they [fol. 42] continued to remain separate property, free and clear of any lien of Mrs. Gilmore under the community property laws of this State or otherwise.

MR. FREED: That will be all at this time.

THE COMMISSIONER: We will take a short recess, counsel, for about five minutes.

(Short recess)

THE COMMISSIONER: You may cross-examine, Mr. Pester.

CROSS EXAMINATION

MR. PESTER: Q. Mr. Haun, did you testify that you were interested here merely in conserving Mr. Gilmore's property?

A. Primarily, yes.

Q. Could you do that without trying the divorce action?

A. No, I don't see how you could.

Q. Then, some time as a part of the time that you spent in this matter was devoted to the divorce proceeding other than the property issue?

A. Well, I think they are intermingled. I don't think you can help that. I don't think you can divide them.

My ultimate purpose was to save this property, as I said, but in order to do so, naturally there was some evidence which was offered upon which the Court could grant the divorce to Mr. Gilmore.

Q. Yes, and you couldn't draw a straight line between one or the other, or between the two of them?

A. I don't think so. It would be rather difficult, although I think percentage-wise you could possibly make an estimate.

[fol. 43] Q. In the case on appeal, practically no discussion was had with reference to the property issue, was there?

A. I don't recall the Briefs on that. I think there was some considerable part of it, but there again the point comes out—I don't know just how to express it—but if we could make out Mrs. Gilmore as being the real cause of the failure of this proposition, this marriage rather, I felt that that would go a long way in upholding the opinion or the decision of the lower Court.

Q. If Mrs. Gilmore were the guilty party, then the Court could not award her alimony; isn't that correct?

A. That is correct.

Q. But so far as community property was concerned, that would still have to be divided, if there were any; isn't that correct?

A. It would not have to be, no.

Q. In other words, if two parties, husband and wife, have divorce litigation and community property is involved, the guilty party is deprived of the community property?

A. Could be. There are many California cases on that.

Q. You stated that you had no concern so far as the awarding of alimony was concerned in this proceeding?

A. I don't think I said "no concern." I wasn't particularly interested in that phase of it.

Q. You have been attorney for Mr. Gilmore over a long period of years?

[fol. 44] A. I have, ever since 1932.

Q. Do you know whether or not in 1952 Mr. Gilmore was paying alimony to a former wife of his?

A. I think he was.

Q. Was any mention made between you and Mr. Gilmore respecting the payment of alimony to another person?

MR. FREED: Just a moment. I object to that question. That seems to be irrelevant.

THE COMMISSIONER: What is the relevancy of this other matter which is not involved in this particular divorce action?

MR. PESTER: There is a question whether or not the time was spent on the property issue other than alimony, just community property, or whether alimony was also an issue in this case. I think it was also an issue.

THE COMMISSIONER: But not for another wife, Mr. Pester. You are asking now about a preceding marriage. I will sustain as to that, unless you can show me the relevancy of it.

MR. PESTER: I am just—

THE COMMISSIONER: Using that for illustration?

MR. PESTER: No, as a foundation as to whether or not this matter was discussed, and if it was, that Gilmore was interested in making sure that this wife didn't get alimony.

THE COMMISSIONER: You may ask him as to that. That would be pertinent.

MR. PESTER: Q. Now, Mr. Haun—

A. No.

[fol. 45] MR. FREED: What is the question?

MR. PESTER: I am going to ask it right now.

Q. Did Mr. Gilmore make any statement to you that he didn't want to be paying alimony to Dixie at the end of this proceeding?

A. I can't recall it at the present time.

Q. The only thing you recall is the community property issue?

A. Oh, I don't believe I testified that that was the only issue in the matter. I say that I wasn't particularly concerned with the alimony end of it. In fact, I felt that he probably would have to pay for two or three years, or maybe longer.

Q. The contentions of the parties will be shown from the Briefs that were prepared and filed in connection with the Appeals.

A. I don't quite get the purpose of your question.

Q. You said something about the contention of the parties in connection with this litigation. I am asking you now whether those contentions will be reflected in the Briefs that were filed in that divorce litigation.

• • • • •

[fol. 46] THE WITNESS: I think they do. At least, most of them do. There might have been additional contentions, but primarily I think they contain the issues.

MR. PESTER: Q. Didn't you testify on direct examination that primarily the issues on appeal were the same; that is, your efforts were the same as in the trial of the case?

A. That's correct.

Q. The Court awarded attorney fees to Dixie's attorneys. Do you recall that?

A. That is correct.

Q. Would you say that the amounts which the Court awarded to her attorneys were reasonable?

• • • • •

[fol. 47] THE WITNESS: Are you referring to all of the money that they received? That is, on the Order to Show Cause and clear on through the trial and appeal and so forth?

MR. PESTER: Q. I am referring to the original Order wherein the Court awarded the divorce decree and set the fee at $10,000.

A. Well, prior to that there was an Order for $1,500.

Q. And this $10,000 was in addition to the $1,500?

A. Correct.

Q. Would you say that that was a reasonable fee for the services rendered?

A. Taking into consideration the services rendered, the results obtained by Mrs. Gilmore's attorneys, I would say yes.

Q. Are you distinguishing the results obtained as one of the factors in the amount to determine the reasonableness?

A. I think that is one of the elements; the amount of money involved, the results obtained. I think such things are to be taken into consideration in fixing a fee.

Q. You testified with reference to Mr. Schwerin. Was he an accountant?

A. Yes, Certified Public Accountant.

Q. Did he furnish you and Mr. Myers with the documents and exhibits which were offered in connection with the community property?

A. You mean the sheets that he made up eventually?

[fol. 48] Q. Yes.

A. Yes.

Q. Did anyone else, in addition to Mr. Schwerin, furnish you some documents or information that you put into evidence?

A. That I can't recall. It's possible that someone from the Gilmore Corporations might have furnished accounts. I can't answer that.

Q. You didn't prepare any sheets or exhibits for the trial of the case, did you?

A. I did not.

Q. Primarily it was the functions of the trial attorneys to put into evidence the sheets prepared by Mr. Schwerin?

A. Yes, I believe so.

THE COMMISSIONER: Just a minute. Would you please read the last question and answer.

(Record read)

MR. PESTER: I believe that is all, Your Honor.

THE COMMISSIONER: Any redirect, Mr. Freed?

MR. FREED: Yes, with respect to the last question and answer. Would you read that question and the one before it.

(Record read as requested)

REDIRECT EXAMINATION

MR. FREED: Q. Did you review the sheets that were prepared, work sheets prepared by Mr. Schwerin?

A. Oh, yes, we did. I did, and Mr. Myer did.

Q. You reviewed them with Mr. Schwerin, did you? [fol. 49] A. Yes.

Q. Was that the subject of conferences between you and Mr. Myers and Mr. Schwerin?

A. Many conferences.

Q. I think you were asked something like this: Whether it was the primary function of the trial attorneys to offer or to introduce these sheets into evidence. Who actually offered those sheets into evidence at the trial of the case? Do you remember?

A. You mean as between the attorneys?

Q. As exhibits, yes, if that is what the question was directed to. I am not sure.

A. I think Mr. Myers and myself. I am not too sure on that; but it could be that those are offered in evidence at the very beginning of the trial as a stipulation to the correctness, because opposing counsel had engaged other accounts to go over the books prior to this at Mr. Gil-

more's expense, and they had checked. Now, that is my best recollection, that those records were offered at the beginning of the trial.

However, I think the Transcript had better speak for itself on that. If not, then it was offered by us.

Q. Were the Transcripts prepared by Mr. Schwerin alone, or were they prepared through conferences with you and Mr. Myers?

A. Well, there were many conferences. Mr. Schwerin and his son—there was a vast bulk of documents that they had to sort out, and I don't recall particularly, but [fol. 50] I think we had many conferences as to what those documents contained, particularly, which of them, for example, were community property obligations, and which might have been separate obligations of the corporation or of Mr. Gilmore. We discussed such things as that many times, so that when finally the thing was funneled down into a definite determination as to which were community obligations and which were separate.

• • • •

THE COMMISSIONER: The record may indicate that the accountant, Mr. Schwerin, who has been referred to here by Mr. Haun in his testimony, has died prior to the trial of this case.

• • • •

MR. FREED: Q. Mr. Haun, are you able to state what elements you took into account in determining the fees that you charged Mr. Gilmore for the years 1953, '54 and '55, too, for that matter?

A. I think it was the time, the difficulty of the issues. I recall there was a District Court of Appeal case that [fol. 51] had been decided upon, which the theory was advanced, which was the same as our theory of this community property—separate property element. That was a petition in the Supreme Court at the commencement of this trial, as I recall, and I wrote the attorneys who represented the defendant in that matter, and asked them to advise me immediately whether or not a rehearing or, rather, a hearing would be granted by the Supreme Court. During the course of this trial, even, I received a tele-

gram from them wherein they stated that the petition in the Supreme Court had been denied, therefore affirming the holding of the theory that I have tried to explain here this morning.

Q. Are you through testifying as to what the elements were? You said time, and what else was it?

A. Well, the time—

Q. The difficulties?

A. (Continuing) — and the difficulty that we had. Oh, there was a lot of leg-work. The Transcript would show all of the evidence that we acquired, going into all the little details, particularly in showing certain testimony of Dixie to be untrue. One, for example, would be—

MR. PESTER: I am going to object to that as immaterial. I don't think that is material to this case, as to what evidence in that divorce action was true or untrue.

THE COMMISSIONER: But he can state the work he did. What other elements did you take into account, Mr. Haun?

[fol. 52] THE WITNESS: Well, the time, the seriousness of the question. It hadn't been definitely decided in California. This theory, as I stated before, there was a possibility of it being held community, and Mr. Gilmore being allowed a certain percentage of that increase. That was a serious question, and the various elements of it. Then, there were the 21-23 or whatever days of trial, and in Marin County you don't start at 10:00 o'clock, you start at 9:30, and you stay there probably till 5:00, with about 45 minutes for lunch. The time there, going across the Bay every day, and I think that is about all I can say on that.

To me, having been associated with Mr. Gilmore for 32 years—rather, since 1932—I practically lived this case for about three years there.

MR. FREED: No further questions.

RECROSS EXAMINATION

MR. PESTER: Q. You were doing other work for Mr. Gilmore and the corporations during this same period of time, were you not?

A. Correct.

Q. Do you recall whether or not the checks that you received would indicate what work it was for?

A. Oh, yes.

Q. The checks indicate—

A. They were all separate. I was on a retainer with the corporation, otherwise, and those checks, by their [fol. 53] very amounts, I can identify them.

Q. They didn't specify on the check work for which the check was being submitted?

A. You mean the check for this divorce case?

Q. Any check that you got from Mr. Gilmore or the corporation.

A. Probably not in so many words, but his checks to me for services in this were drawn on his personal account, practically all of them. There might have been one or two, but I believe all of them, practically all of them, were drawn on his personal account.

Q. Did you keep a time record in your office as to the work you did?

A. I did not.

Q. You and Mr. Myers didn't sit down with Mr. Schwerin and go over the books of the corporation with him, did you?

A. I don't recall going over the books of the corporation as such, no.

Q. In other words, when Mr. Schwerin would bring in a document or documents, you would go over those documents with him in your office or Mr. Myers' office?

A. That is true. He would apparently go over the books, and he would bring us in an entire list. Most of those conferences were held in the office of Mr. Gilmore.

MR. PESTER: I believe that is all, Your Honor.

[fol. 54] FURTHER REDIRECT EXAMINATION

• • • •

DON GILMORE, the plaintiff in this action, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: You are Mr. Don Gilmore, the plaintiff in this suit?

THE WITNESS: Yes, sir.

THE COMMISSIONER: Where do you live now, Mr. Gilmore?

THE WITNESS: I live at 12 Crest Road, Belvedere.

THE COMMISSIONER: All right, Mr. Freed.

DIRECT EXAMINATION

MR. FREED: Q. Mr. Gilmore, about how long were you in the automobile business at the time you married Dixie Gilmore? How long had it been?

A. Well, I was at that time 34 years a Chevrolet dealer.

Q. Had you been in any other kind of business during that period of time?

A. None.

Q. That was the only business that you had been in. [fol. 55] Did you know any other business other than that?

A. None whatever, except the automobile business.

Q. At the time that Dixie filed her divorce action against you, you were the president, were you, of the three corporations?

A. That's correct, I was president and treasurer.

Q. And treasurer? What was your position with respect to the management of those three businesses?

A. I was active manager.

Q. There were other managers under you; is that it?

A. That's right.

Q. You received substantial salaries—the amounts of the salaries will be in the stipulation—for your services from those three corporations?

A. I did.

Q. At the time the divorce action was filed, how old were you?

A. Well, I have to go back. It was in 1942, it was filed, wasn't it?

Q. '52.

A. Well, I'm 68 now, so that would make me 62.

Q. About 62, yes. In this divorce action that was filed, at the beginning were there any attempts at reconciliation?

A. Oh, yes. Prior to the divorce action, in '52, Dixie Gilmore went down south to Beverly Hills, and I tried very hard through long distance phoning and a few [fol. 56] mutual friends of ours in Los Angeles to effect a reconciliation. She flew back, and I really felt we might make a reconciliation, but then her attitude changed entirely and there was no chance.

Q. Through your attorneys, did attorneys Michael Haun and Walter Freitas make any attempts at reconciliation?

A. Only through Mr. Haun.

Q. About how long did that go on, your interest in reconciliation continue, commencing with the time the divorce action was filed? About how long after that was thought given to reconciliation—I mean, thought between you and your attorney?

A. Well, the attempt at reoconciliation was prior to the filing of the divorce action.

Q. In June of 1952 you filed an Answer and Cross-complaint in the Gilmore vs. Gilmore proceeding. At that time did you have any interest at all in preserving the marriage?

A. Not at that time, no.

Q. Or thereafter?

A. Not thereafter.

Q. With respect to a divorce, what was your intent so far as it was expressed to the attorneys? As far as your attorneys are concerned, what was your intent about getting a divorce, or, who was to get the divorce?

A. Well, divorce was not new to me, and I had always figured it was a woman's prerogative to get the divorce. That's about all I can say about it.

[fol. 57] Q. Were you familiar with the negotiations, if any, that your attorneys carried on in your behalf with the attorneys for Dixie Gilmore?

A. Of what nature?

Q. To settle the case.

A. I believe it's my recollection that they discussed with me the possibility or, rather, not the possibility but the subject of her demands as it affected community property.

Q. As far as you are concerned, what was the principal thing in that divorce case?

A. Well, it was maintaining and preserving my income-producing business.

Q. Did Dixie ever demand any part of that business directly, in her conversations with you?

A. Yes. She told me she was going to really take me down the line.

Q. Did you have any concern regarding the alimony that might result from the case?

A. No, I felt the Court would be fair and limit it to a certain length of time.

Q. You owned some other property, I believe, did you not, you and Dixie together? I mean, for example, the home. Did you own that together?

A. Yes, in joint tenancy, the two homes.

Q. Was that a subject of any concern to you in the divorce case?

[fol. 58] A. No.

* * * * *

MR. FREED: Q. There was an issue, was there not, Mr. Gilmore, at the time of the final decree whether during the period of the appeal any community property had accumulated? Was there, or was there not?

A. I don't recall.

Q. Mr. Gilmore, what was the demand, according to your knowledge, that Dixie was making with respect to the community property?

A. Well, my understanding was that she wanted half of the so-called increase in the assets of the corporation plus the Belvedere home.

Q. You were a General Motors dealer for many years, were you not?

A. Entirely General Motors.

Q. In your relations from time to time with General [fol. 59] Motors, your dealerships would enter into franchises or selling agreements, would they not?

A. Yes, at periodical times.

Q. Mr. Gilmore, you owned all the stock in the Don Gilmore San Francisco corporation, did you not?

A. That's correct.

Q. Do you know from your dealings with General Motors Corporation whether you could entrust that ownership with another stockholder as well as yourself? That is to say, someone else who owned part of the stock with you, with or without the consent of General Motors?

A. You could not do it without the consent of General Motors, and the new stockholder would have to be approved by the corporation.

Q. You mean approved by General Motors?

A. General Motors Corporation, Chevrolet Motors Division.

Q. And the same thing applies to Pontiac, as far as you know?

A. The same to all the General Motors Divisions.

Q. In other words, have you had experience on that subject?

A. I have had. I have attempted to sell part of my stock at one time to an employee of mine, and I had to have that approval before I could do it.

Q. Do you know whether they would have approved Dixie Gilmore as a co-owner of the stock?

MR. PESTER: I am going to object to that as calling for a conclusion.

[fol. 60] THE COMMISSIONER: That would be speculative, but he knows and he has testified that it couldn't be done without the consent of General Motors. I think that is the pertinent fact, Mr. Freed.

MR. FREED: Q. You communicated that to your attorneys?

A. In this divorce trial?

Q. Yes, in the divorce action.

A. Yes.

* * * *

MR. FREED: Q. In your agreements with the General Motors Corporation, there was certain capital structure, was there not, that was required?

A. There are very rigid capital requirements for a Chevrolet dealer.

Q. Before you can make any changes in the capital structure, downward, that is to say, below the minimum, would the consent of General Motors be required?

A. Well, it would be [illegible], because you don't go below their standards.

Q. In other words, if you went below the standards, [fol. 61] your contract would be subject to termination by General Motors?

A. That's correct.

Q. This selling agreement, direct dealer's selling agreement with Chevrolet Motor Division of General Motors Corporation provides—I will read it in this manner, if there is no objection—

MR. PESTER: Anything you want to read into the record as to what that provides is agreeable to me.

MR. FREED: I would like to read into the record from the direct dealers selling agreement between the Chevrolet Motor Division, General Motors Corporation, and Don Gilmore, San Francisco, paragraph 2B—B 2:

> "If Dealer does not develop the sale of Chevrolet motor vehicles and chassis to the satisfaction of Seller,"

Seller is the General Motors Company.

> "or does not conduct his business in accordance with any requirement set forth in Sections 11 and 12, Sections 14 to 19, inclusive, or Section 21 of this Agreement, to the satisfaction of Seller, Seller may terminate this Agreement by giving to Dealer written notice of termination to be effective three (3) months after receipt of such notice.

B. (3)

> Seller may terminate this Agreement immediately by delivering to Dealer or his representative written [fol. 62] notice of such termination in the event of the happening of any of the following:—"

I will refer to subsection C—

> "Any sale, transfer, relinquishment, voluntary or involuntary, by operation of law or otherwise, of any interest in the direct or indirect ownership or active management of dealership without the prior written approval of Seller."

Now, on form No. GSD-201-A, Chevrolet-54 of the Agreement, which is not bound, I would like to read Paragraph Third as follows:

> "This is a personal contract being entered into in reliance upon and in consideration of the personal qualifications of and representations with respect thereto of Don Gilmore, jointly, Dealer or partners in the dealership or representative of the Dealer who actively and substantially participates in the ownership and/or operation of the dealership, the individual or individuals designated shall be responsible for any act or omission of any dealers, agents or employees which may be contrary to the purposes and objectives of this agreement or the obligations of Dealer hereunder. Dealer shall not transfer or assign or attempt to transfer this Agreement or any right or obligation hereunder. Dealer shall not make nor [fol. 63] suffer to be made any change in the ownership, financial interests or active management of Dealer without the prior written approval of Seller."

Also, part of this Agreement numbered page 2, but it is loose and not bound, is the Dealer's Statement of Ownership, Financial Interest and Active Management. This sets forth the names of the officers and also the capital of the corporation. Under paragraph 3, entitled "DEALER'S WARRANTY AS TO PRESENT STATUS" there is the following:

> "The undersigned dealer, in consideration of the offer to him of the Chevrolet Selling Agreement herewith being entered into,
>
> (1) warrants that the following constitutes the management, the entire direct and indirect ownership, and the current capital status of the dealership, any deviation from which shall constitute sufficient cause for the immediate termination of said Selling Agreement by Seller, pursuant to the provision thereof entitled 'Termination for Cause'".

If the Court please, I think what I would like to do

is make a picture of this in our office during the noon or later, and then offer it into evidence.

Any objection?

MR. PESTER: I haven't seen that, have I?

MR. FREED: Oh, you haven't? I thought you did.

THE COMMISSIONER: Yes, you may offer a photo-[fol. 64] static copy of that, Mr. Freed.

MR. FREED: I might just make reference—

THE COMMISSIONER: To what it is, to the document? The one you are now going to offer?

MR. FREED: The document is entitled "Minimum Capital Standard Agreement General Motors Dealers Capital Standard Program."

THE COMMISSIONER: Does it have a date on it?

MR. FREED: There is a date, yes, an execution date. The 1st day of November, 1954.

I will call attention to paragraph 1, which sets forth the minimum capital requirements.

• • • •

MR. FREED: Q. Mr. Gilmore, if the demands made by Dixie Gilmor were met by you, what would have happened to the minimum capital structure of Don Gilmore?

A. Well, it would have gone far below General Motors' [fol. 65] standards for that dealer.

• • • •

Q. If Dixie Gilmore had succeeded in obtaining all of the community interests which she claimed existed in the stock of the automobile dealership corporations, what effect would that have had on your ownership and control of those corporations? Do you understand the question?

• • • •

[fol. 66] THE WITNESS: Well, had the Court done that, my agreement with Chevrolet Motor Division and with the Pontiac Division would have been cancelled, because I could not have kept up the capital standard requirements required for any one of those three dealers.

MR. FREED: Q. What would have happened to you?

A. I would have been out of business.

Q. Would you have lost your jobs with those corporations?

A. Oh, yes.

Q. Could you get a job somewhere else?

A. Well, at my age I don't think so.

Q. Let us say, if Dixie had gotten half of what she claimed to be community interests?

A. The result would have been the same.

Q. Suppose she had gotten one quarter of the community interest?

A. Well, I can't say as to whether one quarter of the community interest would have lowered me below the then capital requirements required or not. I don't know.

• • • •

[fol. 67] MR. FREED: Q. Was there any other work that you could have done, that you could have qualified to do, if you had lost your jobs with those corporations, Mr. Gilmore?

A. Well, the automobile business has been my life work, but any other automobile dealer hiring would not consider a man my age.

• • • •

MR. FREED: Q. If you had lost the General Motors' franchise, Chevrolet Motor Division, was there any other business your corporations could have done that would have produced dividends on the stock which you had in the corporation?

A. No.

MR. FREED: No further questions.

[fol. 68] CROSS EXAMINATION

MR. PESTER: Q. Mr. Gilmore, did the capital requirement of the corporation under your franchise increase as the years went on?

A. It did.

Q. In 1954 the capital requirement was greater than in 1953?

A. I can't answer that directly. They usually revise them about every two years.

Q. Well, then, let's say in 1952 the capital requirement was less than in 1954?

A. I believe so.

Q. Then the amount shown here as the capital requirement under this document dated November 1, 1954, would not control with reference to the year 1952, when the divorce action was instituted?

A. I can't answer that, because I didn't know whether they changed the requirement in that two-year period or not.

MR. FREED: I might say, Mr. Pester, that this was the only Dealer-Seller Agreement we were able to find. That is the reason we are using it.

MR. PESTER: Q. I believe you testified, Mr. Gilmore, that you made an effort to reconcile your difficulties with Dixie Gilmore in 1952, prior to the time that the divorce action was instituted?

A. That's correct.

Q. She had gone down south?

[fol. 69] A. Yes.

Q. You worked through friends?

A. Not only friends, but the long distance phone.

Q. Did you see her after that?

A. Oh, yes. She came back to the house. I met her at the airport.

Q. About when was that in relation to the time that she instituted the divorce action?

A. I would say not over ten days.

Q. Did you see her after she left the house?

A. She didn't leave the house, sir, I did.

Q. You left the house?

A. That's right.

Q. Did you see her after that?

A. No.

Q. I believe you testified that after the divorce suit was instituted you made no effort or attempt to reconcile your differences with Dixie?

A. That's correct.

Q. Did you also testify that you didn't ask your attorneys to attempt a reconciliation?

A. That's correct.

• • • •

[fol. 70] REDIRECT EXAMINATION

MR. FREED: Q. Mr. Gilmore, you paid fees to attorneys, Mr. Freitas, did you not?

A. I did.

Q. Mr. Haun?

A. I did.

Q. Mr. Myers?

A. Yes.

Q. You paid other amounts out, did you not? Court reporters' transcripts?

A. Yes.

Q. Printing briefs, et cetera?

A. Yes.

Q. Did you have any quarrel with the amounts that you paid out? Were they reasonable, or not?

A. Are you referring to attorneys' fees?

[fol. 71] Q. The amounts that you paid.

Q. Are you referring to attorneys' fees?

Q. Let's take attorneys' fees first.

A. I felt they were reasonable.

Q. All the other expenses I have mentioned to you?

A. Well, of course I have no means of judging what I was charged for a transcript. It seemed very high.

Q. What about Mr. Schwerin?

A. Mr. Schwerin's fee was reasonable for a Certified Public Accountant.

Q. Do you remember what you paid him?

A. I do not.

MR. FREED: No further questions.

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[fols. 72-73] • • • •

[fol. 74] MONDAY, OCTOBER 26, 1959—
2:05 P.M.

WALTER F. FREITAS, a witness produced on behalf of the plaintiffs, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: Will you give your name for the record.

THE WITNESS: Walter F. Freitas.

THE COMMISSIONER: Mr Freitas, where do you live?

THE WITNESS: I live at 50 Lochinvar Road in the City of San Rafael, California.

THE COMMISSIONER: All right, Mr. Freed.

DIRECT EXAMINATION

MR. FREED: Q. Mr. Freitas, you are an attorney at law licensed to practice in all of the courts of the State of California and have been such for many years, have you not?

A. Yes, since November 1st, 1938.

Q. Your office has been and now is in Marin County?

A. Yes.

Q. Were you engaged by Mr. Gilmore to represent him in a divorce case entitled "Dixie Gilmore vs. Don Gilmore," filed in the Superior Court of the State of California in and for the County of Marin?

A. Yes.

Q. Are you able to state—do you have some office [fol. 75] records with you? I notice you are looking at something there.

A. Yes, I have a photocopy of our ledger showing the amounts and times of entries of charges for fees and for costs advanced, et cetera, and payments made in connection with the account of Don Gilmore.

Q. Without regard to those records for a moment, do you remember approximately when it was that you first got into the case?

A. Well, of course, my memory has been refreshed by looking at those records. I don't think at first I could have recalled the particular year, but I know now that it was during the year 1952.

Q. You were associated with Michael Harn, were you not?

A. That is correct.

Q When you got into the case, were you paid a retainer by Mr. Gilmore?

A. Yes.

Q. But that was in 1952 that you were paid a retainer?

A. Yes.

Q. What was the amount?

A. $500.

MR. FREED: I don't claim that that is material here; I just wanted to establish a pattern.

Q. After you got into the case, did you have conferences with Mr. Gilmore and Mr. Haun?

A. Yes.

[fol. 76] Q. Did you participate in any negotiations for settlement with the attorneys for Dixie Gilmore?

A. Yes.

Q. Were there any negotiations for settlement that you engaged in shortly after you got into the case?

A. If I understand your question correctly, were there any negotiations for settlement shortly after I got into the case?

Q. Yes, by you.

A. Yes, there were.

Q. Would you tell us about them, if you remember.

MR. PESTER: I would like to have him fix the time approximately, at least, and who was present.

THE WITNESS: All right, I will endeavor to do that, sir.

MR. FREED: That is well taken.

THE WITNESS: It was in 1952, during that year. The date there specifically, I don't know, except that I learned upon looking at our records since I was apprized of the fact that I might be asked to attend here that it was in June of 1952 that we first became associated with Mr. Haun in the case.

Within a few days of that, I called Mr. Charles Christin, whom I had known before, and who I knew then to be the attorney for Mrs. Gilmore, along with Les Gillen. I called Charley Christin and stated that we had been associated on behalf of Don Gilmore with Mike Haun, and that I stated further that we had been associated speci-

[fol. 77] fically for the purpose of trial, because it appeared that the case would not be settled, and the parties would not be reconciled.

I said I would like to come over and talk to him about possible settlement. I believe that I had been told by Mike Haun, or from some other source, one that I cannot exactly remember, that there had been some friction between the attorney for Mr. Gilmore and the attorneys for Mrs. Gilmore. I thought perhaps since there wasn't any friction between me and the attorneys for Mrs. Gilmore, that it might be well to try once again.

A meeting was arranged, and it was attended. It was held in Charley Christin's offices. I would say it was sometime in the latter part of June, 1952, and it was attended by Charley Christin and Les Gillen and myself. Nobody else was present.

The place was Charley Christin's office, and that is the best I can do on the time. I don't know if that answers the question, if I was asked to—

MR. FREED: Q. That is enough foundation, I think. Would you tell us what services you rendered in respect to those negotiations; what was said, what demands were made, if any, what responses you made, et cetera?

A. Well, in very brief summary, the meeting itself, I suppose, took a half hour to an hour. The essence of it was that I said, "I understand you fellows have been unable to get together with Mike Haun and settle this [fol. 78] case. It's too bad that it can't be settled. Don Gilmore is a prominent person and the type of personality that the newspapers would like to be able to write about, and we always prefer to settle these cases than try them. Isn't it possible that we can get together? If you fellows want to be reasonable, I think we are prepared to tell Don Gilmore to be reasonable, and maybe we can settle this thing amicably."

They liked that. They said they welcomed the suggestion, indicated that they would be very happy to settle it, but that thus far nothing reasonable had been submitted.

I said,

> "Well, of course, you realize I have just come into the case and I don't know very much about it, but if you will tell me what you think is reasonable, I will take that offer back and consult with our client

and make recommendations to him concerning it, and maybe we can accomplish something."

They then told me that they had information to the effect that at the time when Don Gilmore married Dixie Gilmore his financial net worth—and this is a matter in which I have not refreshed my recollection, so this is purely memory—Don Gilmore's net worth then was told to me by Charley Christin and Les Gilfen to have been somewhere in the vicinity of $160,000 or $120,000. As of a date which was about six years before this, as I remember, because they were married in '46, and this was '52. Contrasted with that, his then current financial net [fol. 79] worth was approximately $800,000, perhaps a little bit over, perhaps a little bit less, but those are the figures that I have in mind, with a difference of approximately $600,000 between what he was worth at the marriage and what he was reportedly worth now at the time of the prospective divorce trial. They felt that this was money which he had earned since marriage, and therefore was community property. They felt Dixie Gilmore was entitled to one half of it, and for purposes of a cash settlement they would discount her 50% of that difference down to a figure of $275,000.

They told me at that meeting that if Don Gilmore would pay Dixie $275,000 in cash, she would waive all claims of alimony, attorneys' fees, court costs, et cetera. They would settle for one lump settlement figure.

I said,

> "Well, most of what you have told me is news to me. I don't know what his financial net worth is now, nor do I know what it was then, but your theory seems plausible and acceptable. If those facts are true, I don't think I can disagree with you. Let me go back and do a little research and find out if those figures are correct."

That was the end of that meeting.

Then I went back to Mike Haun, and I can't remember now whether Don Gilmore was in on that first conference or not—probably he wasn't but as I remember it I went

[fol. 80] back to Mike Haun's offices and I told him briefly what had happened. Then we set up a meeting at which Don Gilmore was in attendance.

I told him that I would like to get into these fiscal matters myself and find out what his balance sheet was as of the date of the marriage and was now, and to try to trace the acquisition of the additional wealth, to see whether it was actually a change of properties, or whether it was simply an appreciation of values of the same things.

I was introduced then to Mr.—I am sorry, I don't know the spelling of his name, but we called him "Mack", and it was McCullough, or McCullen—

MR. FREED: McCullough.

THE WITNESS: He was the general manager of the Don Gilmore offices on Van Ness and Golden Gate, and Don Gilmore told Mack to give me whatever information—

MR. PESTER: I was going to object on statements made between the parties as being immaterial.

THE COMMISSIONER: It wouldn't be admissible, of course, to prove the facts. It would be admissible only to show what the attorneys did. It would be part of the chronology, not to prove the truth of the facts. Go ahead, Mr. Freitas.

THE WITNESS: Gilmore instructed his manager to make available to me any and all data that he had that I might request, which is what I wanted to see, so that we wouldn't have to have Don Gilmore there at every meeting.

[fol. 81] Then, McCullough and I had numerous conferences from day to day on these details of the source of income and assets, and I also recall that I asked him to get me a chart of every check that was written by Don or Dixie Gilmore, not in the business, but in their personal accounts, and to identify the purpose of that expenditure, and to post it to a certain column that would indicate, for example, if it was for food or if it was for steamship tickets, or if it was for clothing or something else. We had a few columns like that where we placed these different expenses in various categories.

As a result of that compilation of data, I came to the conclusion that this couple had expended so much money in their necessities and luxuries of living. I was approaching it on the theory that we had commingling of funds here that came out of the community and out of the separate estate, and I wanted to try to see which had been preserved and whether one had made inroads into the other, and to see what segregation, if any, there should be now made as to his net worth; whether it was all separate or some part separate, and some part community, or conceivably all community.

As a result of these many meetings with McCullough, and the information that he was helpful in providing, I came to the conclusion that—first, I should go back a little bit—I forgot something there that I think is pertinent. There was a matter of what was community income since the marriage, and I tried to differentiate and allocate that. I recall that, and this has not been re-[fol. 82] freshed with reference to any memorandum or data at all. This is just in my memory. In his income tax returns, Don Gilmore had been stating, I think, $50,000 as his salary from the dealerships. There was a question: Is that reasonable?

I learned that Jimmy Waters in San Francisco, another prominent automobile dealer, was being paid the same from his corporation, and that this was the largest amount that was tolerated by the Internal Revenue Service for services of this kind. So, more or less feeling then that that was reasonable as salary, we credited the community estate with that income. Then, making the computations that resulted in the conclusion that more money had been spent by Don and Dixie Gilmore in the enjoyment of their personal community living than had been earned by Don Gilmore and credited to the community estate. It appeared to me that it was sort of a matter of insolvency of the community estate, and I came to the conclusion and told Mike Haun and McCullough and Don Gilmore that I thought there was no community estate left; that whatever was there was the result of appreciation in value of franchises of the dealerships which we had seen in other instances during that period immediately post war, and

that I felt that while there had been substantial community income, they had taken several trips—as I recall there were trips to Europe, and I have forgotten where else—that they had lived it up, let's say, and spent quite a bit of money. There was no argument forthcoming from [fol. 83] any of these fellows, and there was apparent unanimity of agreement among us, at least, that this was so.

Then I was authorized and instructed to go back and convey that message to Messrs. Christin and Gillen, which I did.

I called Mr. Christin and had another meeting, at which Mr. Gillen also attended, and I told them just in review what we had talked about some thirty days or so earlier, and what I had done since then, and what I had found, I thought, by way of application of legal principles to the data that had been submitted to us. I told them that in the best of my opinion there was no community estate. All that was there was separate estate and Dixie Gilmore had no right by way of proprietary interest, at least, in any of that. None-the-less, because there was a controversy, and although we felt that she would be determined to be the guilty spouse, and therefore we felt she was not entitled to any alimony under the laws of our State at that time, none-the-less I had recommended to Don Gilmore, and he ultimately agreed, that she be paid the sum of $10,000 as a compromise of their total differences.

Well, this suggestion wasn't very well received by opposing counsel, and that just about terminated the negotiations for the settlement. They refused, and they said,

"We'll go to trial."

Then, they began to take depositions, and ultimately we withdrew from the case and Mr. Myers tried it. We were not in the case at the time of the trial.

[fol. 84] I think that is about all I can think of in the summary of what was done toward negotiation for settlement.

MR. FREED: Q. During this period of time, did you make any efforts or were any proposals made to you that there be a reconciliation?

A. No, I don't recall that subject ever having come up again after Mike Haun told me, even before I met Don Gilmore, I think—well, I mentioned something about reconciliation, which is usually our first thought, and he said,

> "No, we're past that, and we're also past compromise, even."

I don't recall any talk by me with any of Mrs. Gilmore's attorneys concerning possible reconciliation.

Q. You were still attorney in the case, were you not, when the Second Supplemental Complaint was filed by Dixie, charging Don Gilmore with adultery?

A. Well, it would help me if you would give me that date. I don't recall when it was filed.

Q. The Clerk's Transcript notes that the Second Amended Supplemental Complaint was filed December 23rd, 1952.

A. Yes, we were still in the case at that time. I think it was about the following May that we withdrew from the case. That is subject to confirmation by looking in our file. I am just talking now from memory.

Q. What was the essence of the dispute or the fight, so far as you were concerned, in rendering services to Mr. Gilmore?

[fol. 85] A. I think it was clearly this contention that she was the owner of one half of the difference between his financial net worth as of the date of the marriage and as of the time of the divorce proceeding, which was 1952. Her attorneys were claiming that she was the owner of one half of that increase in his financial net worth on the theory that it was property acquired during the marriage.

Q. What about the alimony? She was claiming alimony too, wasn't she?

A. Well, I am sure the Complaint sought it. It was mentioned without particular emphasis in our early discussions with attorneys for Mrs. Gilmore, and I am sure that it wasn't being waived.

It was not very prominent in the discussions, and when we talked settlement, there was the explanation by them that this $275,000 lump sum payment would, if made, mean that they would waive alimony. We likewise, when we

made a counter-proposal of $10,000, had the understanding that there would be no alimony beyond the lump sum payment of $10,000, which was the settlement figure to cover any property interests that she might have, plus any alimony, plus attorneys' fees, and the other things embraced within the pleadings of her Complaint.

Q. I believe you have already stated that you received $3,500 from Don Gilmore in 1953 as attorneys' fees?

A. That's right.

[fol. 86] MR. PESTER: What was that last question?

THE WITNESS: I don't think I stated it, but I think that is right.

THE COMMISSIONER: Read that last question and answer.

(Record read)

MR. PESTER: I want to object to that.

MR. FREED: Wasn't it stated?

MR. PESTER: No, sir.

MR. FREED: I am just imagining it.

THE COMMISSIONER Mr. Freitas, did you state that earlier you were paid a retainer, but you didn't state how much?

THE WITNESS: That is correct. I don't think I had been asked what the amount was, if any, that had been paid in 1953.

MR. FREED: I thought somewhere in the questioning that had crept in. That is not material.

Q. Do you know how much you received in 1953?

A. Yes.

THE COMMISSIONER: You have a record of it there; do you, Mr. Freitas?

THE WITNESS: Yes.

THE COMMISSIONER: Those are your office records?

THE WITNESS: Yes. On May 1st, 1953, the entry says "Balance, fee, $4,500."

Then, on September the 8th there is another entry here which says, "Fee allowance $1,000."

[fol. 87] September 14, I think it should be—this says 4, but I think it was subsequent to the 8th—$3,500 was paid.

Actually, what happened there, by way of explanation of what appears to be sort of a discrepancy, when we notified Mr. Gilmore that we wished to withdraw, we entered the final fee of $4,500. He, in subsequent correspondence, felt that that was too high, and there were some negotiations which ultimately resulted in our agreeing to reduce our total fee, including a $500 retainer paid in 1952, from $5,000 to $4.500, if he were to pay all of this at that time, and then we gave him the option of if he wanted to go borrow the money he could save $500 and pay us, instead of $4,500, or instead of $4,000 more, if he would pay us $3,500 more in cash we would agree to that. He chose the latter of those two options and paid us $3,500 on or about September the 4th or 14th, 1953.

Q. In your opinion, was this a reasonable charge for your services?

A. I thought it was a little bit low, myself, but that was agreed.

• • • •

[fol. 88] Q. Can you state how much of the fee you [fol. 89] charged, what proportion of the fee you charged, namely, $3,500 in 1953, is attributable to the services rendered which you described in reference to the so-called community interest in the stock of those corporations?

• • • •

THE WITNESS: I would like to qualify that by stating that never until today was there any effort made to separate that issue from the other issues at all. I wasn't conscious of that as we went along, so I don't know how good an estimate this will be. Just for purposes of whatever light it may shed, it is true that what we were concerned with at the time was this matter of—going back a little bit to something I think I should have mentioned, which I didn't, when they said "$275,000 cash," I said, "Well, Don Gilmore doesn't have $275,000 cash, and I don't think he can raise $275,000 cash." Whereupon they said to me, "Oh, that's all right, we'll take stock in his corporations in lieu of cash."

Of course, that was something that we couldn't tolerate on behalf of Mr. Gilmore. We didn't want Dixie Gilmore

as a stockholder in this corporation with him. I think that by far, perhaps something in the neighborhood of 90% of our concern was to forfend against this property claim, and the alimony thing didn't bother us too much, because [fol. 90] I had already learned enough to what we thought was misconduct on behalf of Mrs. Gilmore so that I wasn't apprehensive that she was going to get any large sum of money for any long period of time as alimony. I thought that if we had to we could prove a lot of misbehavior on her part that we didn't want to have to prove if we could settle the property interest question. The alimony was sort of something that went along behind the dog, so to speak, and it wasn't the major issue at all. It was by far the minor issue and received very little attention, I might say.

MR. FREED: No further questions.

CROSS EXAMINATION

MR. PESTER: Q. Mr. Freitas, how much was the total fee that you received?

A. Well, I brought copies of this. If this would be of any assistance to anybody, and I thought perhaps you would like one, and each side would like one, it shows the total fee, in answer to your question, was $4,000. There was $500 on June 16, 1952, and $3,500 in September of 1953.

Q. That thousand dollars that you mentioned on September 8, how did you classify that?

A. Well, it is listed here as "fee allowance." That was really a write-off of a thousand dollars. You see, originally we entered a retainer of $50. When we were withdrawing and I wrote the letter to Mr. Gilmore, I rendered our final statment of $4,500 in addition to the $500, or a total fee [fol. 91] of $5,000. At least a month, or perhaps longer than that after that—

MR. PESTER: I am not interested in the details.

Q. Then, when Mr. Gilmore complained about the size of your fee, you knocked off a thousand dollars and just gave credit, and that is what you call an allowance?

A. Yes.

Q. Who paid that $500 retainer to you?

A. I frankly don't remember, sir, whether it was paid in the mail or whether it was paid by Mike Haun, or whether it was paid by McCullough. I can't answer that.

Q. I thought you had testified that had been paid to you by Haun. Am I mistaken that that was your testimony on direct examination?

A. I don't believe I so testified, because I don't usually testify unless I have a better recollection of it than I have of that. I don't remember who paid it to us. My file might disclose it, if it is important.

Q. That was included in the $4,000 of your fee?

A. Yes.

Q. You received that amount before you did any work in connection with the case?

A. Well, any substantial amount of work. We may have had a small conference or two, but I would say that this was right at the outset, yes.

Q. That is more than 10% of the total fee that you got [fol. 92] in the case, isn't it?

A. Well, it so appears now, by that computation, yes.

Q. What I am getting at is that now you are attempting to say that 90% of your efforts were devoted to the community issue—

MR. FREED: That is not quite right. I object to that.

MR. PESTER: Q. (Continuing)—whereas—

THE COMMISSIONER: Wait a minute.

MR. PESTER: Q. (Continuing)—you received $500 before you knew very much about the case?

A. Yes, I still say that. It might very well have been that we spent the entire time on the property issue alone, without any consideration of alimony, and still the fact that a $500 retainer fee was paid in advance of any substantial performance of services, I think, doesn't indicate for what purpose or purposes the services ultimately rendered were performed.

Q. The divorce action and the nature of the acts which involved adultery wouldn't warrant an allocation of more than $500 to the other $4,000, in your opinion?

MR. FREED: Just a moment. I wish to object to that, really. There has been no allocation made of $500; just an

allocation of the $3,500 as far as this case is concerned. Isn't that correct, Mr. Pester?

MR. PESTER: I don't know.

MR. FREED: It is only 1953 that is involved, not 1952, when the $500 was paid.

[fol. 93] THE COMMISSIONER: Let's go on to the $3,500 basis.

THE WITNESS: I am sorry, I think I will have to have the question read.

(Reporter read the last question)

A. I wouldn't say that that is my opinion, Mr. Pester, no. In other words, the proof and the consideration of the legal contest of the adultery were part and parcel of the property defense, as well as matters, for example, related strictly to alimony, because the Court, who would be dividing any community property which it might ultimately find there was, would have a right and perhaps a duty to take into consideration the conduct or misconduct of each of the spouses when it came to exercising any discretion which the law gave to the Court in the matter of awarding 50% or more of the community property. Even if she had waived alimony initially in the filing of her Complaint, we still would have been concerned with evidence and proof of the issue of adultery, because even if there were no question of alimony, whether Don Gilmore had been guilty of many adulteries or none would have been an issue that we would have to fight on the protection of the separate estate.

MR. PESTER: Q. The alimony question remained in the case so long as you were in it?

A. Yes.

Q. You made no separation of the work that you did during the course of your employment?

[fol. 94] A. That's correct.

Q. What did Mr. McCullough do with respect to the automobile companies in the making of charts that he showed to you?

A. My memory is that he didn't do this personally, but he had it done by someone else, some accountant or bookkeeper, somebody whose name and whose identify I have

forgotten. I don't think that McCullough, himself, did this work.

Q. Let's forget whether Mr. McCullough did the work or not. Do you know how many charts he showed you?

A. No, I don't. They weren't so much charts. Perhaps I haven't been properly understood. They were in the form of charts, perhaps. They were simply postings. In other words, we had over here in this column the date, the payee, the amount, and then what it was for. Then we had a determina of whether it was community or separate. Some of this would be prepared, the checks, the listing of checks, probably by—well, a 15-year old girl could have done that. It was simply copy work, you see, to list these checks out. That data, just by going over the cancelled checks that could be obtained, what it was for, was something that we frankly had to consult Don Gilmore about, because McCullough wouldn't know what it was for. I certainly wouldn't know, and Mike Haun wouldn't know. Sometimes Don Gilmore wouldn't know at first, without refreshing his memory on it a little bit. Ultimately there would be a determination. Whether it was right or wrong, of course I don't know. We determined it as best we could, [fol. 95] what that check was for, and it may have been for flowers for Dixie in Florida. I don't know that. I couldn't tell what they were for. Then we had to depend on him in those instances.

Q. What period of time did that cover?

A. The period of the marriage, sir.

Q. The period of the marriage?

A. Yes.

Q. All three of the automobile companies?

A. No. I thought that I said in my testimony that these were not checks of the automobile companies. It may be the same period, I don't recall the period of the companies, but these were not the company checks.

Q. These were personal checks?

A. Yes.

Q. None of these checks were payments by the corporation to—

A. Well, I couldn't say that that is true. No, it could very well be. This was six or seven years ago, and it could

very well be that some checks—it does seem to me that a lot of personal expenses were paid by McCullough or by the company for Gilmore, and then charged back to his drawing account, or something like that. In fact, some of these checks may have been paid by the corporation. I don't have a distinct recollection of that one way or the other.

The idea was to take expenditures on behalf of this [fol. 96] couple. We weren't concerned with whether they spent money in the corporation in the conduct of their business. We didn't audit the corporations' expenditures.

Q. What I am trying to find out is just what you did in connection with property. What you did was to analyze the personal expenses of the Gilmores during their marriage?

A. That is part of what we did, yes, sir.

Q. And you concluded that more money had been spent by the Gilmores than he had earned from these corporations by way of salary?

A. Yes, sir.

Q. Who worked with Mr. McCullough directly, so far as the attorneys were concerned?

A. I think after I came into the case I worked with him, more than Mike Haun, but I know that Mike worked with him. They were closer in distance to each other than I was. In my opinion, which might be erroneous, I think that I spent more working hours with McCullough than Mike Haun, although I think much of the time that I was there Mike Haun was there too. Perhaps that first conclusion of mine is erroneous. If he was there—I mean, he wasn't really conducting the meeting with McCullough as much as I was. I was telling McCullough what I wanted, and we were reveiwing these checks and ascertaining this data. I suppose Mike Haun was there almost every time I was there. I can't remember that very well.

Q. You were really carrying out as the manager of the [fol. 97] three of you then? In other words, you were asking what data was to be furnished and directing Mr. McCullough, rather than Mike Haun?

A. I would say so, yes.

Q. You said something about depositions having been taken. Can you tell something about those depositions?

A. A little bit.

Q. What did they involve?

A. Well, they involved Mr. Gilmore's testimony. He was being interrogated by Charley Christin in Charley Christin's office. Of course, he was under oath; there was a Court Reporter there; and they were quite lengthy.

I recall that Charley Christin had a large book, a bound volume, from which it appeared to me, at least, because he never showed it to me, that it was a private investigator's report, and a transcript of bugged conversations principally.

I recall that it had—you are asking me what I recall about it—Charley Christin would look at this book, this bound book, and then he would say to Don Gilmore:

> "And then did you say to her something substantially like this,"

and then he would ostensibly read from it, to let us know that he had a verbatim report of this conversation. These interrogations involved Mr. Gilmore's answers. It involved admonitions on my part to him not to answer upon one of two grounds: No. 1, that these reports were aimed [fol. 98] primarily at conduct allegedly occurring since the date of the filing of the Complaint, and therefore it was not within the issues framed by that Complaint. This was prior to the filing of the Supplemental Complaint. I would frequently, whenever I though it was proper, tell Mr. Gilmore that "You don't have to answer that since it relates to a time which is subsequent to the date of the filing of the Complaint," and until they filed a Supplemental Complaint that was within the issues before the Court. That was one ground of objection.

Then, on some occasions, I also urged him to refuse to answer upon the grounds that it might tend to incriminate or to degrade him.

Q. About how long did the taking of those depositions last? How much time did that involve?

A. I know that it wasn't completed in one day. I know that there was—I know this much further about it: There

was disagreement between M.. Christin and myself on some of these questions, as to whether the witness had to answer them, and he certified certain questions to the Superior Court, under the provisions which we have in this State. When you are taking a deposition and there is no judge there to overrule the objection or admonition of witnesses' counsel that they need not answer, then, as was done in this case, Charley Christin went into the Superior Court with certain specific questions which Don Gilmore had not answered, and then requested the Court to certify them and send them back.

[fol. 99] Q. Did you participate in the Appellate action with reference to those?

A. No. My office did, but I didn't.

Q. What do you mean by your office?

A. Well, we have—

Q. Another attorney in your office?

A. Yes, we have partners and associate employees. I was then involved by Court appointment in a long jury murder case, right in the fall of '52, and I couldn't be at both places. I sent one of my partners over to attend to a lot of these things that were concurrently going on.

Q. That work was included in the payment that you received which you have testified to here?

A. Yes, sir, any work done by any lawyer in our office for Mr. Gilmore was all included in this one. This is the only account we have had with Mr. Gilmore.

Q. Did you prepare any Briefs in the case?

A. No. When I said Superior Court, that is the trial court, not the Appellate Division.

Q. Did you keep a record of the work that you did in connection with the case?

A. I didn't myself keep a time sheet. I know that I saw today—I didn't read it—a time sheet kept by a partner of mine who did some work in this case for me. I didn't keep one myself.

Q. You didn't keep a time sheet for the work that you did?

[fol. 100] A. That is correct, I did not.

Q. With reference to this book that he had, and the depositions that were taken which you testified to, all of that pertained to conduct of Mr. Gilmore?

A. Well, I would think that all that was in the book pertained to his conduct, but some of the questions would go beyond that. In other words, during the course of a day's interrogation there would be departures from the reading of the terminology before him, and there would be extemporaneous questions, and then there would be a return to that.

Q. Yes, but generally speaking it pertained to Mr. Gilmore's conduct?

A. Yes.

MR. PESTER: I believe that is all, Your Honor.

MR. FREED: That is all.

THE COMMISSIONER: You are excused, Mr. Freitas.

HENRY J. McCULLOUGH, a witness produced on behalf of the plaintiffs, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: If you will give us your name for the record, sir.

THE WITNESS: Henry J. McCullough.

THE COMMISSIONER: Where do you live, Mr. McCullough?

THE WITNESS: Oakland.

THE COMMISSIONER: You may examine, Mr. Freed.

[fol. 101] DIRECT EXAMINATION

MR. FREED: Q. You are in the automobile business, Mr. McCullough?

A. Yes, sir.

Q. Do you remember how long you have been in the automobile business?

A. 37 years.

Q. Were you employed at one time by Don Gilmore San Francisco?

A. Yes, sir.

Q. A Chevrolet dealer?

A. Yes, sir.

Q. What was your position with that company?

A. In the final years I was vice president and general manager.

Q. In 1952 and 1953 what was your position with the company?

A. I was vice president and general manager.

Q. You know Don Gilmore, and, of course, you knew him at that time?

A. That's right.

Q. Did you have any connection with Don Gilmore Hayward, a Chevrolet dealership there.

A. Yes, sir, I did.

Q. What was your connection with that company?

A. I was a stockholder and officer of the corporation.

Q. Did you have any connection with Don Gilmore [fol. 102] Riverside, a Pontiac automobile dealership?

A. Yes, sir.

Q. What was your—

A. Stockholder and officer of the corporation.

Q. For how many years have you been connected with a General Motors dealership, more specifically Chevrolet?

A. Using Chevrolet since 1933.

Q. Are you familiar with the Chevrolet Motor Division form of contract of General Motors Corporation with dealers?

A. Yes, sir.

Q. The franchise, or contract, is called, is it not, a Direct Dealer Selling Agreement?

A. Yes, sir.

Q. You have had experience in the dealer relationship with General Motors, have you, in reference to that Direct Dealer Selling Agreement? Have you had some experience?

A. Yes, I have.

Q. Do you know what the General Motors policy, General Motors Corporation policy, has been with respect to allowing a wife, for example, of a dealer to own stock in a corporation?

A. Well, I can give you my personal opinion.

Q. Have you had any personal experience, or have you had any observation or knowledge in respect to it?

A. I have had observation both ways, incidentally.

Q. Will you state what they are?

A. Well, one is that they have allowed one dealer's wife [fol. 103] to continue under certain restrictions. That is in Richmond, incidentally, Claare Chevrolet there. Other dealerships, where the wife became heir to the stock of the corporation they have suggested in those cases a reduced amount of ownership, leaving the control in the hands of the new dealer that had been accepted and appointed by Chevrolet to continue the business.

Q. Referring to that Richmond situation, is that a situation in which there is a widow involved?

A. It was originally, yes.

Q. Was she allowed to remain on as the dealer?

A. Yes, she has been.

Q. Still is?

A. Continued, and still is.

* * * *

[fol. 104] MR. FREED: Q. Do you have any knowledge from your observations or experience to which you can refer on the subject of whether specifically Dixie Gilmore, under the contract that Don Gilmore San Francisco had with the Chevrolet Motor Division, could have been a stockholder?

A. Well, the only opinion I can give, I know how Chevrolet Motor Company felt toward the whole case, which had reference to Mr. Gilmore and Dixie Gilmore, of course, in the divorce action.

Q. What was the Chevrolet Motor Division's attitude toward the case, if you know?

A. Well, they certainly weren't very pleased about the whole situation, and various individuals within the framework of Chevrolet at the zone level expressed themselves [fol. 105] as not being too happy about it, in my presence.

Q. Does that have any meaning from the business standpoint?

A. Well, it would have the meaning to the extent that I said a moment ago, that I doubt very much from my knowledge that Dixie would be an acceptable applicant for any portion of an ownership in any dealership that they were issuing a franchise for.

Q. If Mr. Gilmore had lost control of the corporations in which you were interested with him as a stockholder,

that would be Riverside and Hayward, would he have been continued as a salaried employee by those corporations?

A. I believe he would have been continued as a salaried employee, under certain restrictions, of course, not as a controlling interest in the business but in proportion to his investment in the business, whatever it may have been.

Q. Would his salary have been changed?

A. I am sure that the salary would have a downward change. There is no question about that.

Q. In other words, the salaries would have been reduced; is that what you mean?

A. Reduced because of the reduced control in the business, naturally.

Q. As the general manager of Don Gilmore, San Francisco, if Mr. Gilmore had lost his Chevrolet franchise, or if the corporation had lost its franchise with Chevrolet Motors Division, is there any other automobile for which [fol. 106] they could have gotten a franchise? Do you know?

A. Well, that would be highly speculative, because it would be just a question of how strong you went after a franchise and the type of franchise that he would have represented. That, you might say, would be a franchise as profitable or as good as a Chevrolet franchise.

Q. Could Mr. Gilmore have continued to earn the salary, as big a salary as he was earning at Don Gilmore San Francisco, if the franchise, the Chevrolet franchise, had been lost?

A. Well, I think that would have been measured as to the potential from the new franchise, whichever it may have been.

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MR. FREED: Q. You were familiar with the services he performed, Mr. Gilmore performed, for the Chevrolet dealership in San Francisco, were you not?

A. Yes, I was.

Q. Would you say that he was adequately paid for his services?

A. I believe he was.

[fol. 107] Q. Would you say he was generously paid?

A. I believe so.

Q. Could he have earned that much elsewhere, do you think, for the same amount of services which he performed?

A. Well, I could hardly say. You know, it all depends upon the type of business he is in and the organization he is representing. That would be up to them, to decide his capabilities, and what his earnings should be.

Q. Can you say that if Mr. Gilmore had not been the controlling stockholder he would have received as much salary from Don Gilmore San Francisco as he did? Let us say you controlled the company and you owned most of the stock in the company. Would he have received that kind of salary for the amount of work that he did?

A. No, I don't believe so. I don't believe he would have qualified for a salary comparable to what he had been receiving there for the services rendered and the investment in the corporation. It would have to be a little more equitably distributed.

Q. Was there a relationship between the stock ownership and the salary, Mr. McCullough? Did he receive that much salary because he owned all of the stock? Is that the idea?

A. Well, I don't believe that was the complete idea, because the man piloted the organization, of course, as you know, and that, in itself, has some compensation features.

MR. FREED: No further questions.

[fol. 108] CROSS EXAMINATION

MR. PESTER: Q. Mr. McCullough, what meaning did you give to the phrase "adequately paid," when you answered the question as to whether Don Gilmore had been adequately paid for his services?

A. Well, what I had in mind particularly, it was more or less a going compensation or income that was prevailing for a man in his position in a corporation the size of ours at the time.

Q. Do you know what he was paid?

A. I believe it got up to somewhere in the area of around $3,500 a month, if I am not mistaken.

Q. If he got more than that, it was—well, was that of all three corporations that you have reference to?

A. No, I have only reference to the San Francisco corporation.

Q. If it was more than that, he was getting too much?

A. Well, I wouldn't say he was getting too much, but I'd say it was adequate.

Q. You testified to the effect that the General Motors was a little bit concerned about the entire divorce action of Mr. and Mrs. Gilmore?

A. Yes, they were, and the publicity that had been given to it.

Q. Was that by reason of the moral issues involved?

A. Well, they didn't express what they had in mind in particular, but the whole case as a whole. It didn't fit [fol. 109] too well with their thinking at the time.

Q. That was with reference to Mr. Gilmore, as well as Mrs. Gilmore?

A. That's right, both ways.

Q. Where are you employed now?

A. I am with Don Gilmore Hayward, Chevrolet dealership.

Q. He still has that?

A. No, he has not. Gilmore is no longer in the dealership. He has no investment in it at all.

Q. I see. It just bears the name?

A. Carries the corporate trademark, yes.

Q. When did Mr. Gilmore get out of that?

A. The first of this year.

Q. Do you know Mr. Freitas, attorney for Mr. Gilmore?

A. Yes, I do.

Q. Did you work with him in the year 1952 with reference to determining the reasonableness of Gilmore's salary?

MR. FREED: Just a moment. I think that counsel is now making Mr. McCullough his witness, Your Honor.

THE COMMISSIONER: Yes. That was not part of the direct, and your observation is correct. As to this line of inquiry, Mr. Pester, this witness is yours.

MR. PESTER: For this, he can be my witness.

THE WITNESS: What was the question?

MR. PESTER: Would you read the question.

(Reporter read the last question)

[fol. 110] THE WITNESS: I don't recall that we had any discussion about the salary. I did work with the man, because he was an attorney representing Mr. Gilmore at the time. I believe he was the first attorney Mr. Gilmore had handling his case at that time.

MR. PESTER: Q. Do you know what you did in that connection?

A. With regard to the salary?

Q. Well, with regard to work that you did in conjunction with what Mr. Freitas wanted.

A. Well, Mr. Freitas, like all attorneys, asked for certain schedules and details and certain facts and figures that were necessary at the time. We prepared them. Of course, to remember exactly what they are, I don't.

Q. You prepared them, or you had them prepared by some of the workers in the office?

A. Various clerks or people that could put the information together.

Q. You received no additional salary for that?

A. No.

Q. That was included in the salary that you were getting, or your compensation, from the corporation?

A. That's right.

MR. PESTER: That is all.

MR. FREED: That is all.

THE COMMISSIONER: You are excused, Mr. McCullough.

[fol. 111] Counsel, we will take our recess now for about five minutes or so.

(Short recess)

THE COMMISSIONER Let the record show that a written stipulation which has been signed by counsel for both parties, dated October 26th, 1959, is now handed to the Reporter, in order that he may mail it in to the Clerk, along with the Transcript of Testimony in this case. In connection with the stipulation, there are a number of exhibits which will also be handed to the Reporter and which will accompany it.

* * * * *

[fols. 112-135] * * * *

[fol. 136] MONDAY, OCTOBER 26, 1959
—7:30 P.M.

WALLACE S. MYERS, a witness produced on behalf of the plaintiffs, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: Mr. Myers, we have your name, but give it to us for the record, anyway.

THE WITNESS: Wallace S. Myers.

THE COMMISSIONER: Where do you reside, Mr. Myers?

THE WITNESS: 1100 Sacramento Street, San Francisco.

THE COMMISSIONER: All right, Mr. Freed, you may examine.

DIRECT EXAMINATION

MR. FREED: Q. Mr. Myers, you are an attorney at law licensed to practice before all of the courts of the State of California?

A. Yes.

Q. And you have been such for a number of years?

A. That's right.

Q. You were engaged, were you not, by Don Gilmore to represent him in a case that was pending in the Superior Court of Marin County, California?

A. I was.

Q. Do you have any recollection of about when you were engaged by Mr. Gilmore?

A. Well, it was the early spring of 1953. Perhaps [fol. 137] January, February, along in there.

Q. At that time Mr. Gilmore had other counsel too, did he not?

A. Yes, he did.

Q. Do you remember who they were?

A. Well, Michael Haun was his attorney at that time, and he had, I believe, just released the office of Freitas, Freitas and—I don't know whether it was Allen at that time or not, but this was a firm headed by Carlos R. Freitas and Walter Freitas.

Q. Do you remember approximately how long before the commencement of the trial you were in the case?

A. Well, I would say it must have been a little over a month. My recollection is, I think it started some time in March, the trial, I believe, and I had been working on it for probably 30 to 60 days, somewhere in there.

Q. Do you remember whether you had any negotiations with counsel for Mrs. Gilmore in regard to the settlement of the case before the trial started?

A. There had been negotiations, but I don't believe I participated in any. I think they had concluded by that time that—I knew what in a general way had been suggested. I knew something of the demands of the plaintiff, but I didn't pursue it directly after I got into it.

Q. In other words, you personally did not participate in any negotiations before the trial commenced; is that right?

[fol. 138] A. Well, other than Mr. Haun, I think he spoke to Mr. Christin a time or two, but their demands had been, as I recall, in the neighborhood of 270 to 300,000, and it was completely out of the question as far as we could see, so we didn't figure there was any chance of settlement.

Q. Before the trial commenced, were any demands made on you—withdraw that.

After the commencement of the trial, were there any negotiations, to your knowledge, for settlement, in which you participated?

A. I don't recall any.

Q. In the preparation of the case for trial, did you have any dealings with Mr. Schwerin, a Certified Public Accountant?

A. Yes, I did. I told him what I wanted, and he prepared the exhibit for me.

Q. What was the subject of that?

A. Well, there were three automobile agencies, as I recall, three corporations, and these corporations had been formd shortly before the marriage of Mr. and Mrs. Gilmore.

I can only tell you roughly, but there had been an increment of something like possibly $600,000 or possibly more in the value of the stock of those corporations during their married life, and she wanted half of that. It was our contention that none of that was community property, and when I came into the case, Mr. Schwerin had gone through the books and had pretty well familiarized himself with it, [fol. 139] but the picture was not clear as to the community property if any, and the separate property, and I asked him to prepare a statement which would reflect all of the income that Mr. Gilmore had enjoyed from his salaries with the corporations. He had had a salary with each corporation, and I wanted him to reflect those salaries.

Then, I told him I wanted him to set forth all of the community obligations that had been paid during those years, because of the old Van Camp case and some other cases in California, in which it is presumed that all community debts are paid out of the community property. He went to work on that exhibit and prepared it, and it did, as a matter of fact, reflect that there had been more community expenditures than there had been community income, and then we were faced with the problem of whether or not the salary had been fairly fixed. We got evidence to that effect, but the exhibit indicated that there had never been any community property of any substance at all.

As a matter of fact, I think the exhibit showed that his separate property had gone into the acquisition of certain joint tenancy property in Marin County, including a home in Fairfax and one in Belvedere.

That exhibit, as I recall, was our Exhibit No. 4 in the case, and reflected that there was no community property.

Q. You had a fight in court of about 23 or 24 days, I understand?

[fol. 140] A. 24 trial days.

Q. In rendering your services and charging for them, what was your objective in behalf of Mr. Gilmore in that fight?

A. Well, his main concern was that he didn't want his stock bothered, his separate property disturbed. That was

what he considered to be his separate property in the corporations, and I guess that was my main objective, establish the fact that there was no community property and that all of the corporations, the increment, had been natural and had been a growth of private, separate capital and not community capital.

Q. Mrs. Gilmore asked for alimony, I believe, in her Complaint?

A. Yes, she did.

Q. Was that of any concern to you in representing Mr. Gilmore?

A. Well, in a sense, but we frankly didn't have much hope of getting by alimony. I mean, in a reasonable amount we didn't. It was more or less of what I might classify as a windfall when we won the case all the way, and the Court denied her alimony because it denied her a divorce.

Q. Was the issue of the joint tenancy houses, that is the home in which they lived and the other home which they had previously had in Fairfax, which stood in joint tenancy, an issue of any consequence?

A. Well, the Court considered the deeds. The deeds were in evidence, and, as I recall it, the Court concluded [fol. 141] it was in joint tenancy, and that he couldn't dispose of it as community property. I think he held it was a true joint tenancy. Sometimes they say that it is actually in joint tenancy, but is held as community property. I think that was held as joint tenancy property, and he didn't dispose of it or attempt to dispose of it, as I recall.

Q. There was no dispute that there was a co-ownership of 50% each in those?

A. Well, it was a joint tenancy holding, which reflected of record that they were equal owners. As a matter of fact, I think we traced a lot of his separate funds into that Belvedere home, at least.

Q. A great portion of the trial and of the Briefs on Appeal, Mr. Myers, had to do with the conduct of the parties, as I understand. Is that correct?

A. That is correct.

Q. In going into the matter of the conduct of the parties, whether it was gone into first by the plaintiff or by

the defendant, for the purposes of my question that is immaterial, but in going into the conduct of the parties, what relationship would you say that the charges that you made for your services had so far as the time and effort you put in in covering the subject of the conduct of the parties is concerned compared with the subject of the claim by Mrs. Gilmore of a substantial community interest in the stock of those three automobile dealerships? [fol. 142] A. I am not sure I understand your question, Mr. Freed. I might say generally that the fight over conduct was more or less incidental, and it started out as what you might try to say would be a good, clean divorce trial, if there is such a thing, with the parties both wanting a divorce. There wasn't any question about the desire of a divorce.

Mrs. Gilmore began referring to some alleged sexual aberration—I am trying to think of the term she used—

MR. MELCHIOR: I know it; "Revolting suggestion".

THE WITNESS: Revolting suggestion, that was it. She kept saying that he preferred revolting suggestions.

Well, the newspapers picked it up. We were in the early stages of the trial at that time. It was a rather shocking thing, and, of course, the newspapers picked it up, and Mr. Gilmore was sort of worried about what the automobile people would think, and about his franchise, and by that time I had called counsel into chambers, and I told the Judge, and I told them, that I didn't think we should go into that. She wouldn't say what the suggestions were, really. I told him if he persisted in it, we would have to throw it open in order to more or less clear Mr. Gilmore in the eyes of the companies he represented.

Mr. Christin wouldn't do a thing about it, so it was thrown wide open, and that was an incident of the trial that was regrettable, but it developed into quite a bit of time.

Q. Did you bear in mind, for example, that the result [fol. 143] of the divorce case could have some effect upon the division of community property in case the Court found there was some community property?

A. Well, yes. Of course, in California if the decree is granted to one party, that party is entitled to more than half of the community property.

Q. In what cases, a case of adultery or extreme cruelty?

A. In the case of adultery and extreme cruelty which was charged here, so there was the possibility that if the Judge believed her in all the things that she said, and she had charged both cruelty and in a Supplemental Complaint she charged adultery, and if the Judge should believe her, and if the Judge should find community property, he could give it all to her.

Q. So that was one of the important issues, was it, so far as you were concerned?

A. Yes.

Q. Mr. Myers, during the entire period of time that you were in the case, did you personally participate or have any knowledge of any offers or overtures, may I call it, toward reconciliation of the parties?

A. Oh, no.

Q. As far as you knew, was the marriage at an end so far as the relationship of the parties is concerned?

A. I know of no consideration that either party gave to reconciliation.

[fol. 144] Q. No efforts were made on your part, then, to save that marriage?

A. No.

Q. Was quite a bit of attention given during the course of the trial to the salaries that Mr. Gilmore got from the three corporations and to whether the salaries did adequately pay him for his community services?

A. Oh, yes. We brought either two or three expert witnesses to testify that he was amply compensated for the nature of his work by the salaries he received.

Q. Mr. Myers, Mr. Pester and Mr. Miner and Mr. Melchior and I were over at your office the other day to see you about the fees that your records indicated you had received from Mr. Gilmore during 1953 and 1954.

A. Yes.

Q. At that time you examined your records and there was a difference, I believe, between the records that we had and the records you had of about $2,231, something like that?

A. You said so.

Q. I will withdraw that question and tackle it a different way.

During the years 1953 and 1954, do you know what the total amount of fees was that you received?

A. Well, it was $14,000—

MR. PESTER: Just a moment. I would like to have him answer that question yes or no, because I think his [fol. 145] books will be the best evidence of what he received.

THE COMMISSIONER: First answer yes or no about that, Mr. Myers. Do you know? Do you remember exactly?

THE WITNESS: I know within a few hundred.

THE COMMISSIONER: All right.

MR. FREED: Q. Do you know?

A. Within a few hundred.

Q. What is your knowledge on the subject?

A. $14,265 or something. Now, I'm not sure about the 265, but it was a little over $14,000.

Q. Good enough.

A. And my records indicate, I think, that.

Q. Would you say that that was reasonable?

A. It was too cheap. It was very reasonable, I think.

• • • •

MR. FREED: Q. Mr. Myers, have you given any thought since you were asked to come in here as a witness to what proportion, about what proportion, of the total fees that you charged in 1953 and 1954 would be attributable to your services to defend and conserve the interests [fol. 146] of Don Gilmore and the three corporate dealerships?

A. Well, I have given some thought to it, yes.

• • • •

MR. FREED: Q. Well, what portion or percentage—

THE COMMISSIONER: Of the services you rendered?

MR. FREED: Q. (Continuing)—of your total services you rendered were directed to the preservation and protection of Mr. Gilmore's—

MR. PESTER: I want to make the same objection.

MR. FREED: (Continuing)—interest in the automobile dealerships?

MR. PESTER: The same objection, Your Honor.

[fol: 147] THE COMMISSIONER: I will overrule that objection. He may state his opinion, since he tried the case.

THE WITNESS: Well; I think practically all of it. That is, the bigger share of it, anyway. I felt we were just really fighting for about one thing, and that was to clear that as his separate property. That is for the most part.

There were a lot of incidental things done, but the most of it was for that.

MR. FREED: Q. Mr. Myers, after the final decree was entered, which I believe was October the 25th, 1955, were you called upon to make any determination whether Don Gilmore had any community property accumulated at the time of the final decree?

A. I have a recollection that Jim MacInnis, who handled Mrs. Gilmore's affairs during the appeal, at some time about the conclusion or shortly thereafter, contacted me, and I think he talked to Mr. Haun, and demanded an accounting of community accumulations that might have accrued during the interlocutory period. I think I worked on some sort of an accounting, roughly, and I talked to MacInnis, I am sure, a couple of times, and I talked to Mike Haun about it. I feel quite sure I talked to both of them. I think there was correspondence on it.

You have all my files there.

Q. Yes. I will show you something here from your files that may very well refresh your recollection on that. Here [fol. 148] is a legal document. Counsel appear to be James Martin MacInnis and Nicholas Alaga, a Motion for the Termination of Community Property and further and final allowance of counsel fees. Is that on that subject that you were just referring to?

THE COMMISSIONER: Show it to him.

MR. FREED: Suppose I let you look at your file.

A. Yes, I remember.

MR. PESTER: Could I see that document, please.

MR. FREED: Certainly.

Q. Here is the correspondence between you and Mr. Goebel.

A. Yes, I had correspondence. My file reflects correspondence in this connection with—

Q. Do you know the condition from examining your file of the community at the time of the final decree?

A. There never was any community property, and there wasn't any at that time.

Q. Was the community solvent or insolvent, using that term to describe whether there was a deficit?

A. You would have to say it was insolvent.

Q. Do you have any knowledge to what extent the community was insolvent?

A. Well, I see in the file here a recapitulation which would appear that during the period, or at least a good part of the period, there was a salary income of $93,000, and a disbursement of $214,923.82, which included many items in the payment of community debts and taxes and household expenses.

[fol. 149] Q. Would you read those dates again. What were the dates?

A. Well, I see an accounting re alleged community property for the period July 1st, 1953, which was at about the time of the interlocutory decree, I guess, to October 30, 1955, which was at or about the time of the final decree. It reflects seven items of disbursement which total $214,923.82.

MR. FREED: No further questions.

CROSS EXAMINATION

MR. PESTER: Q. Mr. Myers, these two dates that you have there, the first one was in June of 1953?

A. July 1st, 1953.

Q. What figures do you have for July 1st, 1953?

A. Well, this was an accounting period.

Q. What was an accounting period?

A. These are totals for a period of time.

Q. What period of time?

A. July 1st, 1953 to October 30, 1955, a period of about two years, a little over two years, during the time of appeal.

Q. During that period of time there was more money expended than salary?

A. Yes. His salaries for that period, according to this accounting, were $93,040.15.

Q. What are some of the items for which those expenditures were made?

A. "Paid to Dixie Gilmore, pursuant to Court order for alimony, $13,789.66.

[fol. 150] "Paid to attorneys for plaintiff and defendant and trial expenses, $48,228.53.

Household expenses, present living expenses, medical expenses for Don Gilmore, $23,255.48.

Interest on loans, $6,120.45.

Federal and State income taxes, $23,342.89.

Payment on community debt owed to Bank of America, $49,000.

Payment on community account to Don Gilmore San Francisco Corporation, $51,186.81.

Total disbursements, $214,923.82."

Q. That is what you mean when you say that there was a deficit?

A. That is what I mean.

• • • •

MR. PESTER: Q. You said that you had Mr. Schwerin determine the amounts of the salaries paid to Mr. Gilmore, to show where the money came from?

A. I had him prepare an exhibit, yes.

Q. What did you ask him in that exhibit?

[fol. 151] A. I asked him to do this: He had most of the material, and I asked him to prepare an exhibit that would show the total salaries received by Mr. Gilmore during the period of marriage and, as you know, it was a large sum of money. Then, I asked him to detail it. I asked him to charge his separate income with the highest rate of income tax, and his community income the lowest rate of income tax. I asked him to set forth all of the household expenses and expenses of the community, such as travel, all community obligations, and he did that. When he got through, the community expenditures far exceeded the community income, and reflected it.

Q. Did Mr. Freitas turn any papers over to you reflecting the same subject matter when he stepped out of the case?

A. Not that I remember.

Q. Do you know whether or not any of these documents that were turned over to you—I forget this witness' name all the time—

A. Were turned over to me?

Q. No, whether or not Mr. Schwerin had any of these documents prior to the time that you asked for the information. You said he had considerable of that.

A. He undoubtedly did. He had prepared statements which reflected the corporate operations under the franchise, and he had sheets of those, but what I wanted him to prepare was one exhibit, and he did not have that prepared, because I dictated the form. He prepared it with the material he had. He prepared that in accord-
[fol. 152] ance with the form I wanted.

He already had all the information, and I had nothing to do with the reflection of the income and disbursements of the corporations. He had that all prepared.

Q. That is the document which determined whether or not the Court would hold with respect to the community property, if it was, or whether she had an interest in it?

A. That document, in my judgment, won the case for us, so far as community property is concerned, and that is what we were fighting for, to keep all of his separate property from being classified as community property.

Q. I believe you said your main objective in this case was to get a favorable determination for Gilmore with respect to the corporate investments?

A. I think that was his objective, and it became mine.

Q. It became yours?

A. Yes.

Q. As I understand it, the issue of a joint tenancy of two properties was in this case?

A. Yes, it was.

Q. That was determined by the Court?

A. Well, there wasn't much to determine. Two deeds were put in, and they—

Q. Well, there was evidence offered and a determination made by the Court?

A. Yes. I think the Court determined they were in
[fol. 153] joint tenancy.

Q. Now, the question of alimony was in the case too, wasn't it?

A. Yes.

Q. Testimony was put in regarding that issue?

A. Yes.

Q. Some of that testimony pertaining to the community property and alimony would probably be interlocking, would you say?

A. Well, yes, the evidence was.

Q. When it came to the determination of the reasonableness of the salaries of Mr. Gilmore, that was also an issue in the case?

A. Well, inasmuch as if he were not completely compensated for his work, the accruals on the corporations would be tainted with community property. To that extent it was, because we didn't want any increase in the corporate franchises to reflect any community interest.

Q. I believe you testified that shortly after this case went to trial there was some testimony before the Court which, as you say, caused Mr. Gilmore to fear the effect on the General Motors?

A. Well, I don't know how much attention he paid to that, but he told me that the company would not permit him to hold franchises if it were established that he was greatly in the wrong in a matter involving that type of a charge.

[fol. 154] Q. What did you do then?

A. Well, I don't remember exactly when that was, but I know early in the trial, when Mrs. Gilmore started mentioning these repulsive suggestions, I tried to get them stricken from the record and I was unsuccessful in that. I thought it was about time we have a conference on it, so I asked for a conference with the Judge and Mr. Christin.

Q. What did you do with respect to putting on evidence regarding that issue?

A. When she went right on to tell her story, and he said I was trying to beat him over the head with a club in court, and she testified at some length under his direct examination with regard to abnormal sexual—

MR. FREED: You are talking about Mr. Christin's direct examination now?

THE WITNESS: Yes. Naturally we brought up a witness that completely refuted it, and we spent a lot of time. She was examined for a long time, and I cross examined her at some length on that, with regard to trips to Paris and a situation that occurred over there, and a situation that occurred some place up in Canada, the Empress Hotel, I think it was, and there was a lot of testimony in the record about that. Then, we brought the witness that completely refuted her, and the Judge just didn't believe her.

MR. PESTER: Q. Are you familiar with the Transcript of Testimony in this case?

[fol. 155] A. Well, I haven't been over it for a long time, and I don't want to go over it, either.

Q. I was going to ask you whether it isn't a fact that the last four volumes are devoted practically exclusively to conduct?

A. I haven't made that appraisal, but it is possible. There was a lot of very, very nasty testimony that made me ill.

Q. Of course, the record would reflect better than you could state with respect to the amount of evidence that was offered on these different issues, would it not?

A. Yes, of course the record is clear. My memory is five years old.

Q. You at no time made any effort to make an allocation of your services to any of these issues that were involved in this case?

A. Well, not—I didn't finalize any. Mr. Gilmore asked me some time after the conclusion of the trial about that, and I told him I would give some thought to it; that I thought perhaps most of it was, but I didn't know that I could specifically state any certain percentages. I think he dropped the matter then, and I don't know that he ever pressed me for an exact percentage.

Q. You wouldn't state an exact percentage now, would you?

A. Not an exact percentage, unless I said all of it. I think his ultimate goal was for the whole thing. We never, in the trial of the action—we hadn't hoped that [fol. 156] we could beat alimony. I don't know that

alimony was ever a real consideration of ours. We figured she would get alimony. We figured that we were not fighting about alimony, because we figured she would get it for a period of time. About that time, the Courts were, for short marriages, specifying time. It had been the practice in Marin County before that, during our Judge Edward I. Butler days, to just leave it open for an undetermined period, but at about that time the new Judges were—

MR. PESTER: If the Court please, I am going to object. I don't think this is responsive to my question.

MR. FREED: I think it is. I think it is quite responsive.

THE COMMISSIONER: I think he is trying to answer it, Mr. Pester. Go ahead, and you can ask him another after he concludes.

You are talking about the alimony now, and it was not a big factor so you didn't actually make any mathematical allocations at that time, did you?

THE WITNESS: No, I did not.

THE COMMISSIONER: All right, Mr. Pester, I think that answers it.

MR. FREED: What about the testimony he was just giving there?

MR. MELCHOIR: He was interrupted there.

MR. FREED: Yes, interrupted very effectively, I think.

[fol. 157] THE WITNESS: I would only conclude, if I may do that, that at about that time they were saying, in cases of short marriages, which this was classified as a short marriage, that there would be alimony for two years or three years, and, frankly, we had not considered that alimony for a reasonable period of time would be objectionable, or that we could avoid it.

MR. PESTER: Q. You were engaged in the trial of this case for about 21 days?

A. 24 trial days.

Q. 24 trial days?

A. It wound up at 7:00 o'clock at night, when I was due in Sonoma County the—

Q. Let's assume that the community property issue were not involved in this case. What would you consider a reasonable attorney's fee for handling the divorce action?

MR. FREED: I object on the ground that it is incompetent, as well as irrelevant and immaterial.

THE COMMISSIONER: Wouldn't that be speculative, since that assumes a fact not in issue, Mr. Pester? I mean, it is not in evidence.

MR. PESTER: I think all of the facts are in evidence. I am just asking that he exclude one element of this case.

THE COMMISSIONER: If you want him to exclude one element and state how much of his services were attributable to the other elements, he may answer as to [fol. 158] that. Rephrase your question.

MR. PESTER: Q. Let's eliminate from this Gilmore divorce action the community property issue. Upon the trial of the case, on all the other issues involved, what would you consider a reasonable attorney's fee?

A. Well, in the first place, the case wouldn't have lasted two days, and I would have probably charged him about $1,000.

Q. You mean it wouldn't last two days with all this conduct issue in it?

A. We would have never gone into it. She could have walked into Court and had a divorce and gotten alimony for a reasonable time, and there would never have been a fight. We were not fighting about alimony.

Q. Well, you were fighting the divorce, and the conduct of Mr. Gilmore—

A. We only had to fight it because she was asking for something like $300,000 in money that didn't belong to her, and she was trying to taint that with community property.

Q. Isn't it a fact that you also fought on the conduct issue?

A. Certainly we fought on the conduct issue.

Q. Wouldn't that have taken more than a day or two days?

A. Well, may I put it this way, Mr. Pester: If you are fighting over $1,000, you don't try a 24-day case—

I don't. That case wouldn't have lasted two days, because we would have never really pressed it.

Q. But the $1,000 wasn't involved in the conduct issue, [fol. 159] was it?

A. The conduct issue was only involved because there was $600,000 or thereabouts of property involved. That is the only reason.

Q. Isn't it a fact that the conduct issue was raised by her, and that was the thing that took you into Court for a conference with the other attorneys?

A. Well, that was when she was trying to get the lion's share of property that she claimed was community property, which was not, in fact, community property. We couldn't avoid the double-barreled fight. We couldn't say, "Well, you take a divorce and then we will go on and see whether it is community property," because if she had gotten the divorce without a contest, and then the Judge had said, "Well, I really think there is about $500,000 worth of community property," then we would really have been in a bad predicament.

Q. But that community property was based upon the ownership with respect to Gilmore? That is, with respect to Gilmore's ownership prior to the marriage, of Gilmore to Dixie?

A. Well, he owned the stock, and it was a sort of a one-man corporation thing, and he was the main party involved. It was one of those cases where the Court can very easily look through the corporate setup and see the individual, and we were afraid he might, unless we established the facts as we did.

Q. With respect to the other evening, when Mr. Freed, [fol. 160] Mr. Melchior, Mr. Miner and I were out to see you, you computed the amounts paid to you and they totalled $13,033.83; is that correct?

A. No, I wouldn't say that is correct. I didn't look over my records myself. I had a new girl run off a tape, and I don't know what it showed. As a matter of fact, you may have it. I gave it to somebody.

MR. FREED: I have it. I mean, I took it.

THE WITNESS: I don't know what the totals were, but I am sure that I received for the services something over $14,000 in two years.

MR. PESTER: Q. How would you account for the difference between the $13,033.83 and the $14,000 and some odd dollars?

A. I wouldn't try to account for it. I received the money and I don't know—I am not trying to account for it. I know what I got.

Q. But the computation which the girl furnished you didn't equal that amount.

A. I wouldn't say that. I don't know what it showed. I turned them over to somebody, and I don't have them. I don't remember totalling them. I think they did. As a matter of fact, I think—

Q. Didn't you run them off on an adding machine?

A. Yes, I did. I think they totalled $17,000, as a matter of fact.

Q. You showed them to Mr. Miner, and Mr. Miner [fol. 161] made a note of them?

A. I certainly did. The three years totalled $17,000. Now, how it was broken down by year, that I can't tell you, and if Mr. Miner can, he might refresh my memory.

MR. FREED: Here, I have it. Eureka!

MR. PESTER: Hand it to the witness.

THE COMMISSIONER: Yes, let him see that.

THE WITNESS: Well, this isn't my writing on here, but I suppose this is the tape that came off, and for the two years it indicates $14,033.83. I think that is short by a couple hundred, something like that.

MR. PESTER: Excuse us just a minute, Judge.

THE COMMISSIONER: Yes.

MR. PESTER: I want to offer that in evidence, if the Court please.

THE COMMISSIONER: Does the record show clearly that Mr.—

MR. FREED: Wait a minute—oh, excuse me. I am sorry to interrupt you. I wanted to mention the fact that I wrote that. That is my handwriting up there.

THE COMMISSIONER: That is what I was going to ask about, that Mr. Myers did not put the handwriting on the exhibit, but he did prepare or have prepared the adding machine type figures shown thereon? Is that correct, Mr. Myers?

THE WITNESS: I will tell you what happened. My secretary, who has been with me a very short time—well, [fol. 162] we went up in the loft and got out the old books, and she presented to me a statement on a yellow sheet. I don't know whether I gave that to Mr. Freed or not.

MR. FREED: No, we left it there.

THE WITNESS: I totalled up the year 1953. I ran off the tape on what she had, and I got $12,033.83 for the year 1953, and I ran a total on the year 1954 and got just $2,000, or a total of $14,033.83.

Now, my memory tells me that is not the correct amount. I'm quite sure there is a couple hundred somewhere. It is just a small amount.

THE COMMISSIONER: At least, on the basis of the records that you then found, this was the correct total?

THE WITNESS: That was the total I had then.

THE COMMISSIONER: It may be admitted in evidence as Defendant's—I understand you have no objection, Mr. Freed?

MR. FREED: No.

THE COMMISSIONER: Defendant's Exhibit No. 1. You may so mark it, Mr. Reporter.

(An adding machine tape containing figures and hand written information was marked as Defendant's *Exhibit A*)

MR. PESTER: Q. Is this the total amount that you received from Don Gilmore during those two years?

A. The first two years, I think there is two or three hundred missing. Now, I don't know where it is. I didn't go over my books again. I think I received about—there [fol. 163] must have been a bill some place. Did you find a bill of mine?

MR. FREED: There is a document here. I might as well produce this, because it has been bothering me.

MR. PESTER: Just let me examine this witness, first.

THE COMMISSIONER: Wait, Mr. Freed, until we finish the cross, and you can cover that. Go ahead, Mr. Pester.

MR. PESTER: Q. I want to know whether that reflects all of the fees that you were paid by Don Gilmore

during those years as shown there, other than a couple hundred that you think might be missing.

A. Yes, I think so.

Q. Did you do any other business for Don Gilmore in the year 1953?

A. I don't remember any.

Q. Did you do any in 1954?

A. Except for this case, it would have been very incidental. I don't know.

Q. The evening that we were there, didn't you pull out a file that pertained to some other case?

A. Yes. In '56 we had a—I think in 1956 we brought an action for rent and ejectment.

Q. Have you got that file with you?

A. No—well, wait a minute. Maybe I gave it to—yes, I gave all my files to Mr. Freed. It was in 1955. Judgment for restitution of the property was the pleading in 1955.

Q. When was the action commenced?

[fol. 164] A. October 13, 1954.

Q. And it was concluded?

A. March the 2nd, 1955. As I recall, there is a charge that came on later. I don't know. I told you I couldn't identify it positively, but for 418 or thereabouts. Now, I wouldn't say that is exactly it, or that was the case, but—

Q. Yes, you got a fee in 1956, and you thought that that was for this case?

A. No. We had I earned a lot more than that. We had the appeal, you know. When the case went up on appeal, I billed Mr. Gilmore along, and I think he paid me, over the next couple of years, '54 55, in there sometime, another two or three thousand dollars for the appeal work. The first fee of $14,000 plus was for the trial only, and for all the work I put in after that he paid me, of course, extra. I billed him for it.

Q. Do you know how much you charged him for this?

A. I can't state without looking at my other records.

Q. You don't know whether he paid you anything in 1955 for the services rendered in connection with that case?

A. In 1955? Oh, he might have in '55. I suppose he did. I think probably he did in '55. I don't think he paid me anything in '54 on it.

Q. That is when the action was commenced?

A. Yes. I don't think he even advanced the fees. When I have a good client, I usually advance small fees. [fol. 165] small filing fees, for the Superior Court. He might have sent the costs over. I don't know.

Q. Are you in a position to say that none of these items that were received during the year 1954 included a payment with respect to services rendered in connection with that case?

A. I am quite positive that the record of '53 payments and the record of '54 payments does not in any way cover this action which was started in the fall of '54.

Q. And concluded when?

A. In March of '55. As I recall, we had more or less of a settlement. I was leaving for Europe in the spring of '53, and right after the trial, it was a very short time, I left. I was gone for a month or so, and I think my best recollection is that the fee of $14,000 plus a few hundred was for the trial of that case, and that the other amounts which he subsequently paid me were for the appeal work and for things like that. I think I have one payment of 418 or thereabouts which I had more or less thought that might be this case.

Q. That was paid to you in 1956?

A. Well, '55 or '56. I don't know. I would have to check my records. I am quite sure it wasn't paid in '54.

Q. In a case that was started in '54 and ended in March of 1955, you got no fee whatever until the year 1956, according to your—

A. I didn't say that.

Q. What did you say?

[fol. 166] A. I said I was probably paid in 1955. Now, may I see that sheet again, the one that was offered in evidence. The adding machine record. This adding machine record shows that, as I read it, during the year '55 I was paid, over and above $14,000, the sum of $3,478.05.

A lot of that was for appeal work, and it is possible some of it was for this case. After this, I think there

was still another $418 paid to me in either '55 or '56. I think the most of this 1955 payment of $3,478.05 was for appeal work in the divorce action.

Q. The work done with regard to the appeal would be reflected in conjunction with what is set out in the Briefs?

A. Yes, we were still—

MR. PESTER: I think that has been answered.

THE COMMISSIONER: That is right.

THE WITNESS: It has.

MR. PESTER: Q. Mr. Myers, can you tell us whether you ordered the printing of the Transcript in connection with the appeal?

A. You mean in the Superior Court?

Q. Yes, the Transcript was typed by the Reporter?

A. Yes.

Q. Did you ask that that Transcript be typed so that you would have the record on appeal?

Q. Well, I can only tell you what usually happens. Usually the Appellant files a Notice of Appeal and a [fol. 167] request for the preparation of the record, and I suppose that was done in this case. Somebody has to have it. The Supreme Court wouldn't—

Q. Yes, and that would be at the Appellant's request?

A. Well, ordinarily they file—under the rules, the Appellant must file his Notice of Appeal, and within 10 days file a notice to prepare the Reporter's Transcript on the evidence, and if there is anything missing, then the Respondent sets forth the things that should be in the record too.

Q. You didn't ask for the Transcript to be typed up. You weren't appealing?

A. We didn't file the appeal.

Q. No.

A. We didn't file the appeal.

Q. If Mr. Gilmore paid for that Transcript, that was paid for the benefit of Dixie, in connection with her appeal; is that right?

A. I don't think so.

Q. For whom would it have been, then?

A. Well, in every case that goes up, ultimately the loser pays for—ordinarily pays for the Transcript. We

had to fight it or take the chance of paying for it. I suppose we paid for it, yes. Gilmore paid for it, because he was ordered by the Court to pay for it. I remember now, if you are talking about who paid for it.

Q. I am talking about who paid for it and who ordered it.

[fol. 168] A. Well, I would assume that the Appellant ordered it, and I am quite sure Mr. Gilmore paid for it at the order of the Court.

MR. PESTER: I believe that is all.

MR. FREED: No questions.

THE COMMISSIONER: You may be excused, Mr. Myers.

(An adjournment was had until 10:00 o'clock in the morning of October 27, 1959, to be resumed at Room 59 of the Federal Office Building in San Francisco, California)

[fols. 169-218] • • • • •

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[fol. 219] TUESDAY, OCTOBER 27, 1959

THE COMMISSIONER: All right, Mr. Pester, we will take your witnesses now.

(Testimony for defendant)

MR. PESTER: We will call Mr. MacInnis.

[fol. 220] JAMES MARTIN MacINNIS, a witness produced on behalf of the defendant, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: Give us your name for the record.

THE WITNESS: My name is James Martin MacInnis. I am a lawyer. I live at 2511 Baker Street, San Francisco. My office is 41 Grant Avenue, San Francisco.

THE COMMISSIONER: All right, Mr. Pester, you may examine.

MR. FESTER: Q. Mr. MacInnis, you are admitted to practice in all courts of the State of California?

A. Yes.

Q. Were you engaged as an attorney in the Gilmore versus Gilmore divorce proceedings?

A. Yes.

Q. When did you first become interested or become attorney in connection with that case?

A. Sometime in the spring of 1954, after the decision before the trial court, and pending the taking of an appeal.

Q. So you came in after the trial of the case had been concluded?

A. Yes.

Q. Do you know or can you recall the issues that were involved in that litigation?

[fol. 221] A. Yes.

Q. Will you name them, please.

MR. FREED: Just a moment. I object to that, Your Honor. We have the pleadings in evidence, and we have the Transcript.

THE COMMISSIONER: Yes, but I permitted plaintiffs' witnesses to testify generally about the issues, and while the pleadings will govern, the objection is overruled. The witness may give his recollection.

THE WITNESS: The trial judge basically had denied any relief to Mrs. Dixie Gilmore. He had granted the divorce to Don Gilmore. He had declined to recognize the theory of double divorce, which at that time was a novel doctrine in California. He had declined to recognize that any of Gilmore's properties were community property, and he had declined to recognize that admitted acts of misconduct on the part of Gilmore should be viewed in the same light as the evidence concerning the bad conduct of the plaintiff, which he had believed.

Those were basically the issues. There were sub issues which flowed from them, whether or not the element of condonation existed in the case; whether or not there was an intermingling of properties to the extent that the nature of the property had become lost. There was a

further issue as to whether oral declarations and conduct between the parties had affected the nature of the property. There was a further issue as to whether the [fol. 222] character of the prevailing party, Don Gilmore, as revealed by the evidence, was such that he was incapable of having the notion of extreme cruelty inflicted upon him. Those are some of the minor issues which flowed from the major ones.

Q. In the appeal of the case, what was your primary objective?

MR. FREED: Just a moment. I object to that on the ground that this tax case does not concern the objectives of the plaintiff, Dixie Gilmore, represented by Mr. MacInnis, who, by the way, is only the attorney on appeal, not the attorney in the trial court.

MR. PESTER: Well, I asked him—I limited my question to the appeal matter.

MR. FREED: It concerns only the objectives of Don Gilmore, and the services performed by his attorneys to accomplish those objectives.

THE COMMISSIONER: I think as a matter of law you can argue that, Mr. Freed. As a matter of the admissibility of evidence, I will overrule the objection.

THE WITNESS: The objective was to obtain a reversal of the case. Of course, there were facets of that objective too.

MR. PESTER: Q. Who ordered the Transcript of the trial in the lower court that was necessary for the appeal?

A. If I correctly recall, the lawyers for Dixie Gilmore, at that time in the person of myself, I am fairly certain, [fol. 223] made an application before Judge Martinelli, who had tried the case, asking that costs on appeal be awarded the appellant, and the major cost would have been the Transcript of Evidence. The other factor of cost would have been the printing of Briefs. The Judge granted the request in both instances.

Q. After you came into the case, Mr. MacInnis, did you have any negotiations pertaining to the proposed settlement of the litigation?

A. Some. There was no great finality to any of them. I attempted, as I suppose would be true of any lawyer

in the same situation, to salvage something out of a case which had already been lost. I suppose I made overtures to Mr. Wallace Myers and to Mr. Michael Haun, who represented Don Gilmore.

The initial overtures that I made were not well received, because they pointed out that they were somewhat belated; that they should have been made earlier; and they didn't feel that their position was such that they could advise their client to pay very much money. There was some small measure of concession that was offered at that point, but in around May of the following year, 1955, we were fortunate enough to obtain a reversal of the case in the District Court of Appeal, the First Appellate District, Division One, in an opinion written by Mr. Justice Bray.

At that time it would have appeared that Dixie Gilmore was restored to her original position, and then there were some serious negotiations. Then, the attorney for Dixie [fol. 224] Gilmore became over-confident and didn't accept the settlement offer at that point, and then the other side won in the Supreme Court, which granted a hearing.

Q. With whom did you negotiate in 1955? Did you say?

A. Yes.

Q. After the reversal?

A. Yes, with the same lawyers, Wallace Myers and Michael Haun.

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[fol. 225] MR. PESTER: Q. Mr. MacInnis, do you have knowledge of the efforts that were put forth by the defendant's counsel?

A. I can say they opposed what we did vigorously, on every issue. Do you mean by way of things done outside those matters which would be revealed by Briefs or by arguments in Court?

Q. No, I mean now on appeal with respect to matters that pertained to the appeal.

A. Well, concerning their efforts, I wrote a lengthy Brief which you were kind enough to show me before I took the witness chair this afternoon, and in looking over the sub-index I see that these matters we have discussed

[fol. 226] were all covered in great detail. I remember that, of course, each proposition that was voiced by us was answered by the other side in its Brief.

Q. That is the extent of your knowledge pertaining to the efforts—

A. Well, I know they worked on phases of the case that would not necessarily be capsuled into Briefs, but I would know that only from my contacts with them.

Q. That was your contacts with them in connection with the divorce action?

A. Yes.

Q. Can you give us an opinion with reference to the percentage of efforts put forth by the defendant's counsel?

MR. FREED: I object again. I don't think a proper foundation has been laid. This witness has referred to the Briefs and said the points raised by him were answered, and vigorously.

THE COMMISSIONER: Yes. He also said, though, he had some information by personal contacts.

MR. FREED: Personal contacts? What contact was that? Did he observe how they worked, how much time they put in on one issue?

THE COMMISSIONER: You might inquire about that, Mr. Pester.

MR. PESTER: Q. Did you observe the time that these people put in on these issues?

[fol. 227] A. No, because actually these issues all overlap in California law. If a person gets a divorce upon the ground of cruelty, the Court is not authorized but directed to award to that party more than 50% of any community property, so that the factual issues of conduct and the issue of community property merge to that extent.

Then, the credibility of parties will be an issue which will merge where there are different assertions by them about the manner of treatment of property. I couldn't offer any assistance on percentage of effort for either side in the case.

Q. Do you think it is possible in an action such as this to determine a percentage of effort on any particular issue?

MR. FREED: Just a moment. I object to this on the ground it has been asked and answered and fully covered by the question previously asked and the answer.

THE COMMISSIONER: I think it is a little different in form. Overruled. He may answer.

THE WITNESS: I am sorry, would you repeat that.

(Reporter read the last question)

THE WITNESS: No.

MR. PESTER: That is all.

MR. FREED: No questions.

THE COMMISSIONER: Mr. MacInnis, you are excused, sir.

We will take a five minute recess.

(Short recess)

[fol. 228] THE COMMISSIONER: You may call your next witness.

MR. PESTER: We will call Mr. Christin.

CHARLES A. CHRISTIN, a witness produced on behalf of the defendant, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories testified as follows:

THE COMMISSIONER: Mr. Christin, give us your name for the record.

THE WITNESS: Charles A. Christin.

THE COMMISSIONER: Where do you live at the present time?

THE WITNESS: 2660 Green Street, San Francisco.

THE COMMISSIONER: All right, Mr. Pester.

DIRECT EXAMINATION

MR. PESTER: Q. Mr. Christin, you are admitted to practice in all courts of the State of California, are you?

A. Yes, sir.

Q. Were you one of the attorneys in the divorce action of Gilmore versus Gilmore that was had in Marin County in about 1953?

A. I was.

Q. Whom did you represent?

A. Mrs. Gilmore, Dixie.

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[fol. 229] Q. Did you prepare the Complaint in the case?

A. I did.

Q. Are you familiar with the issues that were involved?

A. I am.

Q. Can you name some of those issues, or the issues—

MR. FREED: I am going to object to that.

THE COMMISSIONER: The objection is overruled. As I earlier indicated, of course, the record on that will control, but inasmuch as the witness was one of the counsel in the case, I will permit him to give his recollection for this purpose.

THE WITNESS: General cruelty, first, general demurrer, insufficiency of facts, amended to include adultery.

MR. PESTER: Q. Was there an issue pertaining to joint tenancy of some property?

A. Not in the pleadings.

Q. Not in the pleadings? Did that arise in the case?

A. It did.

Q. Did any other issues arise in the case that you didn't set out in your pleadings?

A. Well, the adulterous conduct had to be proven. It was generically stated as adultery, then it has to be proven specifically.

Q. Was alimony involved?

A. Oh, yes, property settlement.

Q. That is community property?

[fol. 230] A. Well, there was the issue. They were married six years.

Q. And salaries?

A. Oh, yes, ability to pay alimony if allowed.

Q. In your opinion, which was the chief issue in the case, if there was one?

MR. FREED: Just a minute. I object to that, if the Court please, on the ground that what Mr. Christin regards as the chief issue is immaterial and irrelevant, because we are concerned here only with the relationship of legal expenses to services rendered by counsel for the defendant, not for services rendered by Mr. Christin.

THE COMMISSIONER: Yes, but the objection is overruled.

THE WITNESS: May I have the question.

(Question read by the Reporter)

A. Getting a divorce, generically speaking, but specifically, first of all, getting the award of a divorce, to be followed by some sort of adjudication by the Court of the property rights and alimony, permanent or temporary.

I mean by temporary, for a limited period of time, because of the brevity of the marriage.

THE COMMISSIONER: Because of the brevity of the marriage?

THE WITNESS: Yes, because, in other words, you don't get very much for six years. You don't get that answer, "The Best Years of My Life." You don't get that one. If you don't get that answer, you don't get much.

MR. PESTER: Q. In connection with the trial of this [fol. 231] case, and prior thereto, did you have any negotiations for settlement?

A. I did.

Q. With whom were those negotiations?

A. Haun, Gillen and me.

Q. That was prior to the trial?

A. I believe so, or during the trial. I can't remember.

Q. Mr. Myers was not in on any of those?

A. Not to my recollection.

* * * *

MR. PESTER: Q. In connection with the trial of this case, did you have occasion to observe the efforts that were put forth by defendant's counsel on these respective issues?

A. Well, I saw the manifestation of his activities in Court, by their conduct, and in preparation, and saw what they did, by that, by their efforts. I would say that I observed their physical and mental and legal acts.

Q. Could you then give an opinion with reference to the percentage of efforts which they put forth on these respective issues?

MR. FREED: I object again, if the Court please, on [fol. 232] the ground that an adequate foundation has

not been laid yet. There has been no showing that Mr. Christin knows how much work and what kind of work, the quality and character of the work, that was done by the attorneys for the defendant outside of Court.

THE COMMISSIONER: Of course that is a factor, but I believe that is directed more to the weight of this testimony than its admissibility. I will overrule the objection.

THE WITNESS: Question?

(Reporter read the last question)

MR. PESTER: Q. You may answer now.

A. Well, first, Freitas was in it, Freitas and Haun, and took depositions. Whether you could have adultery after the filing of a Complaint was the issue there. The Judge held it was immaterial, but it showed quite possibly an adulterous disposition. That was deposition. We took all the depositions for the purpose of proving our case. My side, of course, wanted to prevail on adultery. I had five witnesses in the courtroom who he admitted on the stand that he had committed adultery with eight of them in the last twelve weeks, so he was a pretty good man.

Then, we went into the main question then as to whether this most objectionable, filthy and nasty act took place with three people in the room at the same time—

MR. FREED: If Your Honor please, I dislike to interrupt the witness but I don't believe his answer is responsive.

[fol. 233] THE WITNESS: Is it? I am putting the efforts—

THE COMMISSIONER: Mr. Christin, what the counsel has asked you is if you could give an opinion as to the relative proportion of time spent, time or services spent, on these different issues, without describing what they were.

MR. FREED: His efforts.

THE WITNESS: How can I give you the element of time if you don't let me submit the issues? You ask a question specifically, and I will answer it, Mr. Commissioner.

THE COMMISSIONER: Revise your question so he will understand.

MR. PESTER: Q. Could you state the percentage of effort that counsel for the defendant put forth with respect to the respective issues involved in the litigation?

MR. FREED: Just a moment. I object to that question on the ground there has been some foundation relating to trial, but there has been no foundation relating to out of court or on appeal.

THE COMMISSIONER: Of course we are limiting this answer to the trial.

MR. PESTER: Yes.

MR. FREED: Just to the trial, then, in the courtroom?

THE COMMISSIONER: Yes. As to the other part of the objection, it is overruled. First, can you give us an opinion on that, Mr. Christin? That is the first—

THE WITNESS: Give me the question.

[fol. 234] (Reporter read the last question)

A. Well, you want me to pick out the various parts of the litigation? I would say about—well, if you want to talk about proving the case and defending the case, I would say about 80% - 20, 25%. Of course, these are only guesses. I can't pull that out of my mind. It means nothing to me. You are asking me a question I can't—

MR. PESTER: Q. You are now rendering an opinion?

A. I know. Well, the opinion has no foundation because I don't remember. How can I say a proportion of time to an issue at this time? I don't want you to think I am evasive. I don't care who wins this thing.

THE COMMISSIONER: All right, Mr. Christin. We first ask you if you are able. You say you are not able to do that?

THE WITNESS: That question I am not able to answer at this time.

MR. PESTER: Q. Could you state whether the divorce issue and the efforts to prove the case were the chief issues, or was it a subordinate issue in the case?

A. Chief.

MR. FREED: I object to that on the ground that the record is the best evidence, and that Mr. Christin's

opinion of what the most important issue in the case was may be entirely different from the opinion of counsel for the defendants. They were paid for their opinion: Mr. Christin was paid for his opinion.

[fol. 235] THE COMMISSIONER: Objection overruled.

THE WITNESS: Question?

(Reporter read the last question)

A. Well, it was a primary issue. You had to win the first one first in order to get anything out of the second. In other words, I'd say the primary was the most important fact, actually, to get a divorce. Then, after that you try to prove your alimony or property settlement, or property rights

MR. PESTER: I believe that is all, Your Honor.

MR. FREED: No questions.

THE COMMISSIONER: You are excused, Mr. Christin. We will take a short recess.

(Short recess)

OFFER IN EVIDENCE

MR. PESTER: If the Court please, the defendant would like to offer in evidence the Reporter's Transcript of the trial of Dixie Gilmore versus Don Gilmore in the Supreme Court of the State of California—

MR. FREED: I beg your pardon, the Superior Court.

MR. PESTER: Yes, the Superior Court of the State of California for Marin County, together with the Clerk's Transcript.

I think the Clerk's Transcript contains awards of alimony which aren't shown in any of the Orders in the Transcript proper. Am I right?

MR. MELCHIOR: Off the record.

(Discussion off the record)

[fol. 236] THE COMMISSIONER: Mr. Pester, are you ready to have this read into the record?

MR. PESTER: Yes, Your Honor.

THE COMMISSIONER: Proceed, Mr. Melchior, if you will.

MR. MELCHIOR: Page 26 of the Clerk's Transcript.
MR. MINER: Page 11, I believe, is the first place.
MR. MELCHIOR: Page 11 of the Clerk's Transcript:

"In the Superior Court, June 6, 1952.
Present: Honorable Thomas F. Keating, Judge.
George H. Gnoss, Clerk.

Clerk's Minutes:

This matter coming on upon an order to show cause, demurrer. Mr. Christin appearing on behalf of the plaintiff. Mr. Haun and Walter F. Freitas appearing on behalf of the defendant. Sworn, Don Gilmore, sworn Dixie Gilmore, recalled, Don Gilmore.

It was by the Court ordered that the defendant pay the plaintiff the sum of $1250 per month, pendente lite, $1500 counsel fees on account. Demurrer overruled—ten days to answer."

Page 26:

"In the Superior Court, August 22, 1952.
Present: Honorable Thomas F. Keating, Judge.
George H. Gnoss, Clerk.

Clerk's Minutes:

This matter coming on upon an order to show cause, [fol. 237] counsel for all parties appearing. It was by the Court ordered motion to file Supplemental Complaint granted, ordered that the order to show cause re contempt for failure to answer questions discharged.

Sworn Dixie Gilmore, by the Court ordered that $1500 be allowed for investigation fee, $750.00 on account of deposition fees."

Next page?

MR. PESTER: 79.

MR. MELCHIOR:

"In the Superior Court, April 24, 1953.
Present: Honorable Jordan L. Martinelli, Judge
Joseph Henneberry, Clerk: Harvey Prather, Reporter

Clerk's Minutes:

This matter coming on regular continuance, both counsel present in Court at which time recalled for plaintiff rebuttal: Dixie Gilmore. At 11:03 A.M. Court recessed to 11:23 A.M. at which time both counsel present. Recalled Dixie Gilmore, recalled Charles Christin, at 12:00 noon Court recessed to 1:40 P.M. at which time both counsel present. Recalled Dixie Gilmore. Plaintiff rests. Mr. Myers moved the Court to strike all certain evidence. Denied. Mr. Christin proceeded to give oral argument followed by Mr. Myers. At 3:05 P.M. Court recessed to 3:25 P.M. at which time both counsel present. Mr.
[fol. 238] Myers continued his argument followed by Mr. Christin in rebuttal.

It was by the Court ordered decree of divorce granted defendant and cross-complainant, no community property for disposition, Fairfax residence held in joint tenancy, Belvedere residence not joint tenancy, and is separate property of defendant and cross-complainant. $10,000 fee plaintiff's counsel. $750 per month alimony for five years, death or remarriage to be reconsidered at expiration of five years at request either party. It shall not be necessary for moving party to make any other statement other than the above order."

Page 83:

"In the Superior Court, June 29, 1953.
Present: Honorable Jordan L. Martinelli, Judge.
George H. Gross, Clerk: Norman Pauker, Reporter

Clerk's Minutes:

This matter coming on for settlement of findings, Charles Christin and Leslie Gillen appearing on be-

half of the plaintiff, Wallace Myers and Mr. Haun representing the defendant.

A recess was taken at 11:10 A.M. until 11:35 A.M. at which time counsel answered ready.

Court was recessed at 12:15 P.M. both counsel to prepare written findings and return again for the [fol. 239] Court's signature at 4:00 P.M.

Counsel appearing at 4:45 P.M. and again conferring with the Court for settlement of findings.

It was by the Court ordered that an Interlocutory Decree of Divorce be granted to the defendant and cross-complainant, property disposed of in accordance with provisions set forth in Interlocutory Decree signed this date."

Page 109:

"In the Superior Court, August 28, 1953.
Present: Honorable Jordan L. Martinelli, Judge
George H. Gnoss, Clerk; Harvey Prather, Reporter.

Clerk's Minutes:

This matter coming on regular continuance, upon a motion to have costs retaxed by the Court, motion to strike. James M. MacInnis appearing as counsel for the plaintiff, Wallace S. Myers and Michael Haun appearing on behalf of the defendant. Sworn James M. MacInnis, Dixie Gilmore. At 4:55 P.M. Court recessed to 5:10 P.M. All counsel present. Recalled Dixie Gilmore. Sworn for the defendant Henry J. McCullough, Don Gilmore.

It was by the Court ordered motion to strike granted to items, Lipsett stricken, Dr. Lyons to $150; Prather remained. Lindsey mileage allowed, actual cost of Transcript on Appeal payable direct to Re- [fol. 240] porter on filing, respondent pay costs of Briefs, allowance $1,000. Counsel fees on account for appeal, $500 per month alimony pending appeal."

MR. PESTER: Is there an order with respect to the Transcript?

MR. MELCHIOR: That is all, Mr. Pester.

MR. MINER: There are orders that the Clerks prepare the Transcripts, and Reporter to prepare Transcripts, just following that.

MR. MELCHIOR: I have read it into the record. It says:

> "It was by the Court ordered motion to strike granted to items, Lipsett stricken, Dr. Lyons to $150. Prather remain, Lindsey mileage allowed, actual cost of Transcript on Appeal payable direct to Reporter on filing, respondent pay costs of Briefs, allowance —"

et cetera, et cetera.

THE COMMISSIONER: Off the record.

(Discussion off the record)

MR. PESTER: I think that covers it, Your Honor. There is another order here, but—

THE COMMISSIONER: I believe the record should show that the orders that have been read into the record are from the Clerk's Transcript on Appeal from the Judgment of the Superior Court of the State of California in the case of Dixie Gilmore vs. Don Gilmore.

[fol. 241] MR. FREED: I was just going to suggest that I think it would be helpful if those orders were stated to the Minute Orders of the Clerk. They are necessarily just things written in the minutes by the Clerk.

THE COMMISSIONER: Let the record show that those are the Minute Orders of the Clerk; the brief form indicates that.

All right, Mr. Pester, we are ready for your offer of this Transcript of the Testimony in the case.

MR. PESTER: Yes. I offer the Reporter's Transcript, Volumes 1 through 11 and the Master Index.

THE COMMISSIONER: No objection, counsel?

MR. FREED: No objection.

THE COMMISSIONER: The Transcript is admitted and we will give it the number P. with a subdivision 1

to correspond with volume 1 and so on, and the Master Index will be the last number, which will be 12, I suppose.

I will add the request with the admission of this particular exhibit, counsel, that you point out specifically by page and even by paragraph any portions thereof upon which either one of you may be relying, on account of its great length.

(A Transcript of the Testimony and Proceedings in the case of Dixie Gilmore vs. Don Gilmore was admitted Defendant's *Exhibit P*, consisting of 11 volumes and a Master Index, numbered P-1 through P-11, the Master Index being P-12 in evidence)

MR. PESTER: I will call Mr. Miner.

[fols. 242-272] • • • •

[fol. 273] IN THE
UNITED STATES COURT OF CLAIMS

No. 374-58

DON GILMORE AND SUE GILMORE

v.

THE UNITED STATES

Eli Freed for plaintiffs.

Benjamin H. Pester, with whom was *Assistant Attorney General Louis F. Oberdorfer*, for defendant. *James P. Garland* and *Lyle M. Turner* on the brief.

OPINION—Decided June 7, 1961

LARAMORE, *Judge*, delivered the opinion of the court:

This is a suit to recover the alleged overpayments of income tax, plus interest accrued, for the taxable years 1953, 1954, and 1955. The defendant counterclaims for the years 1953 and 1954.

Plaintiff[1] is the owner of 100 percent of the shares issued and outstanding of a corporation named Don Gilmore—San Francisco. He is also the owner of 60 percent of the issued and outstanding stock of a second corporation, Don Gilmore—Riverside. In addition, he is the owner of 73⅓ percent of the stock issued and outstanding of a third corporation, Don Gilmore—Hayward. Each of the three named corporations is a franchised dealer of a division of General Motors Corporation. Each of these businesses operated under an annually renewable franchise contract which contained a clause giving the [fol. 274] manufacturer the unilateral right to terminate the franchise on a 90-day notice. The plaintiff is, and

[1] Sue Gilmore is the present wife of plaintiff. They were married on November 1, 1955. Hereafter, any reference to the term "plaintiffs" in the plural number, pertains to the tax year 1955 only and refers to both Don and Sue Gilmore. The singular "plaintiff" refers solely to Don Gilmore.

for many years has been, the president and principal managing officer of each of the three above-mentioned corporations. He has received the following combined gross salaries from them:

1949	$79,800.00
1950	61,316.65
1951	66,799.92
1952	66,799.92
1953	66,799.92

From his ownership of stock he received as dividends:

1948	$109,484.80
1949	69,438.23
1950	50,663.48
1951	114,625.65
1952	73,044.00
1953 (D. Gilmore—San Francisco only)	39,657.02

The only income of plaintiff, from sources unrelated to these automobile dealerships for the years in suit was $1,024.90 in 1953, and $516.60 in 1954.

From March 2, 1946 to October 25, 1955, plaintiff was married to one Dixie Gilmore. During all of this time the couple were residents of California. On April 8, 1952, they separated. Two days later, Dixie Gilmore filed for divorce in the Superior Court of the State of California in and for the County of Marin where the parties resided. On June 16, 1952, the plaintiff in the instant case filed an answer to the complaint and a cross-complaint for divorce. This action came to trial, commencing March 16, 1953, and continuing on order until April 24, 1953. The trial court found in favor of Don Gilmore, granting him an interlocutory divorce, denying the divorce to the wife, and decreed that there was no community property of the marriage.

Within the time allowed, Dixie Gilmore appealed this interlocutory judgment to the District Court of Appeals, State of California, First Appellate District. That court, on April 26, 1955, entered its decision reversing the judgment below and ordering a new trial. Thereupon, Don Gilmore petitioned for a hearing of the appeal in the Supreme Court of California. A hearing was granted

in the case, and the decision of the District Court of Appeals was vacated by the Supreme Court, and the judgment of the trial court in all respects affirmed by it [fol. 275] on September 23, 1955. After the Supreme Court had affirmed the interlocutory judgment of divorce, a final judgment of divorce in favor of Don Gilmore and against Dixie Gilmore was entered in the trial court on October 25, 1955. As a result of the protracted litigation proceedings, Mr. Gilmore was required to pay legal fees in the amount of $32,537.15 for the year 1953, $8,074.21 for the year 1954, and approximately $5,300 for the year 1955.

The question of community property was an important one during the divorce proceedings. Prior to plaintiff's marriage in 1946, the value of his stockholdings in the three automobile dealerships was approximately $200,000. At the time of their separation, the value of these stockholdings had risen to approximately $800,000. This is an appreciation of $600,000, and it was the contention of Dixie Gilmore that this appreciation was community property. On this basis she contended that she was entitled to one-half the amount, but she was willing to settle for $275,000.

Plaintiff timely filed his individual income tax return for all three years in question. Among other things, plaintiff took a deduction of 80 percent of the loss of the fees involved in the divorce proceedings as an expense incident to the defending of properties and investments. He also claimed deductions in his returns of the full amount of certain State taxes which were due on his full salary. Plaintiff, because he is an employee, had a certain amount of his wages withheld by his employer. In estimating his tax liabilities for 1953 and 1954, plaintiff credited himself with the full amount withheld.

Upon an audit of plaintiff's 1953 and 1954 individual income tax returns the Commissioner of Internal Revenue made a number of disallowances and adjustments, based on the following determinations:

(a) The principal disallowances resulted from the Commissioner's determination that the attorneys' fees, accountant's fee, court reporters' fees, and printing costs,

which Don Gilmore paid in 1953 and 1954 in connection with the divorce action, were personal expenditures of Don Gilmore and were not deductible under Section 24(a) of the 1939 Internal Revenue Code.

[fol. 276] (b) The Commissioner determined that only $9,762, or one-half of the $19,524 income taxes withheld from Don Gilmore in 1953 should be credited to him, and this resulted in a finding by the Commissioner that $4,881 of the tax liability reported on the 1953 return of Don Gilmore had never been paid.

(c) The Commissioner of Internal Revenue also determined that of the $5,643.10, which Don Gilmore had paid in 1953 for State income and unemployment taxes, Mr. Gilmore was entitled to a credit in his return of only one-half, or $2,821.55, and that the balance was deductible by Dixie Gilmore.

(d) In his 1953 income tax return, Don Gilmore had erroneously reported that, of the $66,799.92 of salaries paid to him during that year, the amount of $50,099.92 was taxable to himself individualy, and the balance of $16,700 was taxable to Dixie Gilmore. The error caused his individual income for the year 1953 to be overstated by the amount of $16,699.96. This error was recognized by the Commissioner of Internal Revenue, who made an adjustment showing that only one-half of the total salaries paid were taxable to Don Gilmore individually.

As a result of various disallowances and adjustments the Commissioner assessed deficiencies in income taxes against plaintiff as follows:

Year	*Tax*	*Interest*	*Total*
1953	$18,883.26	$4,264.25	$23,147.51
1954	3,762.21	583.12	4,345.33

On November 1, 1955, Don Gilmore and Sue Gilmore were married. When they filed their joint income tax return on April 15, 1956, they claimed a credit for all taxes withheld from Don Gilmore's salary in 1955. In Addition they reported as income the total amount of the salary as their joint income. They filed a timely claim for refund of income taxes paid for the year 1955 on the grounds that income received prior to October 25,

1955, was the community property of Don and Dixie Gilmore and that one-half is taxable to Dixie Gilmore.

The defendant in this case asserts a counterclaim against Don Gilmore for the years 1953 and 1954. As a [fol. 277] result of the Commissioner's adjustments concerning the income tax returns of Dixie Gilmore, it was determined that she had a tax balance due of $3,863.78, plus interest for the year 1953. It was similarly determined that she owed $78.93, plus interest, for 1954. A demand for payment was made on Dixie Gilmore on January 7, 1958. Defendant contends that plaintiff, as the husband of Dixie Gilmore, had full and complete control of the community income and is liable for the income taxes of Dixie Gilmore, together with the interest due thereon.

The issues that present themselves are patently discernable from the foregoing sequence of events and we shall direct our answers in the order that the questions appear.

This court has recently had occasion to review the question of deductibility of legal expenses incurred in divorce litigation. *Davis* v. *United States*, No. 516-58, decided March 1, 1961. In that case the plaintiff attempted to deduct two types of legal fees paid by him; first, legal fees paid for tax advice, and second, legal fees incurred in connection with the protection of income-producing property. This court allowed the deduction as to the first type of legal fees, but denied the deduction as to the second type. In the instant case we are concerned with deductions of the second type; *i.e.*, expenses incurred in connection with the protection of income-producing property.

The general rule is that attorneys' fees paid in connection with a divorce are not deductible. Therefore, in order to bring himself under the section permitting the deduction, plaintiff must show that the legal expenses were incurred in matters directly related to his business or the management, conservation, or maintenance of property held for the production of income. *Port* v. *United States*, 143 Ct. Cl. 334.

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, provide:

§ 39.24(a)-1 *Personal and family expenses.* • • • Generally, attorneys' fees paid in a suit for divorce or separate maintenance are not deductible. However, the part of an attorney's fee paid in a divorce or separate maintenance proceeding which is properly attributable to the production or collection of amounts includible in gross income under section 22(k) is deductible under section 23(a)(2). • • •

[fol. 278] In *Davis* v. *United States*, *supra*, we discussed the pertinent cases in this area of the law. We pointed out that there were two groups of cases followed by the courts. One class of authority follows the decision in *Lykes* v. *United States*, 343 U.S. 118, and the other class follows the decision in *Baer* v. *Commissioner*, 196 F. 2d 646. We indicated a belief that it was not necessary to choose which decision is right in the premises because of factual differences in the two lines of cases. We are still of this opinion. However, the facts in the instant case clearly come under the rule laid down by the court in the latter line of cases. At the time of commencement of the divorce proceedings, plaintiff was 62 years of age; he had spent all his adult life in the retail automobile business; he would not have been able to gain employment in some other business, neither could he obtain employment as president or general manager of an automobile dealership, except through a controlling stock ownership interest. The evidence is clear that the large salary paid to plaintiff was not in return for his services rendered, but because he was the controlling stockholder. It is not too difficult to imagine that an irate ex-wife, if she gained control of a corporation, would dispose of her ex-husband as president. Thus, plaintiff was fighting not only to protect his income-producing property, but to prevent the loss of his salary as well.

In addition to the possible loss of his income, and the possible loss of 50 percent or more of the appreciation in the value of the stock, plaintiff could have lost his franchise with the General Motors Corporation through a proviso in the contract permitting a termination in the event of:

Any sale, transfer, relinquishment, voluntary or involuntary, by operation of law or otherwise, of any interest in the direct or indirect ownership or active management of dealership without the prior written approval of Seller.

The sensational nature of the divorce charges of adultery and misconduct, brought by Dixie Gilmore, were published in the local papers. This adverse publicity created a real fear that General Motors might terminate the franchise if the allegations were established and a divorce granted to the wife. Even though Dixie Gilmore took the initiative in raising charges of misconduct, the [fol. 279] plaintiff resisted these charges and brought charges of his own. He did this not because he opposed the idea of his wife obtaining a divorce, as evidenced by the fact that six days after the divorce became final he married again, but because of the consequences that would result from a determination that the charges brought against him were well founded. It is important to notice that under California law, the court must award *more* than 50 percent of the community property, and may award *all* of the community property to the innocent spouse in divorces based on extreme cruelty or adultery. There can be little doubt that Dixie Gilmore sought more than a divorce. If that was all she wanted, she received it at the trial level, but this divorce action went all the way to the Supreme Court of California. Dixie Gilmore wanted a substantial part of the income-producing property of plaintiff.

The Internal Revenue Code of 1939, 26 U.S.C. (1946 Ed.), which was in effect at that time, states:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.

. . . . .

(2) Non-trade or non-business expenses.

In the case of an individual, all the ordinary and necessary expenses paid or incurred during the tax-

able year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

Of course it is true that in every divorce case a certain amount of the legal expenses are incurred for the purpose of obtaining the divorce and a certain amount are incurred in an effort to conserve the estate and are not necessarily deductible under section 23(a)(2), but when the facts of a particular case clearly indicate that the property, around which the controversy evolves, is held for the production of income and without this property the litigant might be denied not only the property itself but the means of earning a livelihood, then it must come under the provisions of section 23(a)(2), *supra*. The only question then is the allocation of the expenses to this phase of the proceedings. Here, the plaintiff claims that 80 percent of the legal expenses were incurred [fol. 280] in the conservation of his income-producing property. The commissioner of this court found that at least 80 percent of the legal expenses were so incurred and this is supported by the evidence. The defendant contends that it is the burden of the taxpayer to establish the exact amount to which he is entitled and, if he cannot meet this requirement, then the deduction must be denied. In considering this contention our attention immediately focuses on the landmark case of *Cohan* v. *Commissioner*, 39 F. 2d 540, where Judge Learned Hand directed the court to this question, at page 543:

> • • • The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. • • •.

This decision has proved a valuable and workable rule over the years and has withstood the attacks made upon it by the Internal Revenue Service. We are not prepared to sanction an outright frontal attack upon this rule.

We are of the opinion that the evidence presented by the plaintiff is sufficient to support a finding that 80 percent of the legal expenses incurred in this instance were paid in the conservation of income-producing property. Also, we can find no merit in defendant's further contention that the expenses were actually incurred in defense or perfection of title of a capital asset. The stocks in question belonged to plaintiff before he was married and the wife never suggested that he did not hold perfect title to them. In fact, to do so would have defeated her purpose because if he did not have perfect title in the stocks she could not have asserted an interest in the appreciation thereon. Under these circumstances there can be no question that plaintiff has perfect right to the stocks.

Therefore, following the same rationale as in the *Davis* case, *supra*, we reach a contrary conclusion. The facts [fol. 281] in the instant case indicate a situation similar to the facts in *McMurtry* v. *United States*, 132 Ct. Cl. 418; *Baer* v. *Commissioner*, *supra*; *Bowers* v. *Commissioner*, 243 F. 2d 904; and *Fisher* v. *United States*, 157 F. Supp. 364.

We turn next to the question whether the defendant was correct in crediting plaintiff with only one-half of the state taxes paid by him, and one-half of the Federal taxes withheld from his salary for the years 1953 and 1954.

Section 35 of the 1939 Internal Revenue Code provides:

> § 35. *Credit for tax withheld on wages.*
>
> The amount deducted and withheld as tax under Subchapter D of Chapter 9 during any calendar year upon the wages of any individual shall be allowed as a credit to the recipient of the income against the tax imposed by this chapter for the taxable year beginning in such calendar year. • • •

The Regulations then define who the recipient of the income is:

> § 39.35-1. *Credit for tax withheld on wages.*
>
> • • • For the purpose of the credit, the recipient of the income is the person subject to tax imposed under chapter 1 upon the wages from which the tax was withheld. For instance, if a husband and wife domiciled in a State recognized as a community property State for Federal tax purposes make separate returns, each reporting for income tax purposes one-half of the wages received by the husband, each spouse is entitled to one-half of the credit allowable for the tax withheld at source with respect to such wages.

The authority in California is clear that the earnings of the husband continue to be community income until the final judgment of divorce. *Waters* v. *Waters*, 170 P.2d 494. The amounts of these salaries were community income owned equally by Don Gilmore and Dixie Gilmore and one-half of such community income was taxable to Don Gilmore and the other one-half to Dixie Gilmore. In filing his income tax returns for the years 1953 and 1954, the plaintiff arbitrarily attributed a high percentage of the income to himself and a low percentage to his wife. The only way we know that the whole of something may be divided equally into two parts is by dividing [fol. 282] it in half. Therefore, we are of the opinion that the defendant was correct in adjusting plaintiff's tax return to reflect this amount of income. This necessarily brings us to the question of what amount of deductions should be allowed to plaintiff considering that only half of the total salaries was taxable to plaintiff individually. We s[illegible]ain the Government on the issue pertaining to the a[illegible]ount withheld from the salaries. It is apparent that if the salaries are community property, to be divided 50-50, any amount withheld to pay an obligation of both should be considered to have been withheld from each. This is consistent with Treasury Regulation 118, § 39.35-1, and it appears to be a fair and equitable solution to the problem.

On the other hand, the answer to the question of which party is entitled to the deduction for California personal income and unemployment taxes is quite different. The general rule is that a taxpayer cannot deduct taxes "paid or accrued" unless he is legally liable to the authority imposing the tax. The applicable California statute provides:

> § 18555. *Liability of spouses; community income; joint returns.*
>
> The spouse who controls the disposition of or who receives or spends community income as well as the spouse who is taxable on such income is liable for the payment of the taxes imposed by this part of such income. • • •. [California Revenue and Taxation Code (61 West's Ann. Calif. Codes)]

We think this statute establishes the liability of the plaintiff for the state tax responsibilities of his wife. Since plaintiff paid the taxes he is entitled to the deduction. In the case of *Al Jolson*, 3 T.C. 1184, the husband was entitled to deduct the wife's state income taxes which he paid because he was personally liable under the state law.

After these adjustments are made there will remain a tax deficiency on the part of Dixie Gilmore for the years 1953 and 1954. The defendant counterclaims for the amounts of these deficiencies on the basis that they are taxes incurred upon the community income of Don and Dixie Gilmore. We agree that the salaries paid plaintiff during this period were community property, but it does not follow that plaintiff is liable for the tax deficiencies of his wife. In our search of the authorities we have been able to find only two unreported cases that stand [fol. 283] for the proposition that the community property is 100 percent liable for the tax liabilities of one of the parties when they had filed separate returns. *G. J. Rodgers*, 51-2 USTC, ¶ 9495; *R. F. Ruan*, 51-2 USTC, ¶ 9493. The weight of authority is to the contrary. In *Marjorie Hunt*, 22 T.C. 228, the Tax Court stated at page 230:

> * * * For purposes of Federal income taxation, each spouse is equally liable for payment of the tax on his or her respective equal share of the community income. *United States* v. *Malcolm*, 282 U.S. 792 (1931); *Poe* v. *Seaborn*, 282 U.S. 101 (1930). This liability is fixed and definite. It is not a means of splitting income which may be voluntarily chosen or elected to minimize taxes. * * * Her liability for tax ceases only when her interest in the community income ceases. * * *

Again, in *Harrold*, 22 T.C. 625, the court in referring to the two unreported cases mentioned previously stated at page 628:

> * * * It is contrary to a line of cases in which we, and other courts, have held that the powers of management conferred upon the husband by community property laws do not render him personally liable for taxes on his wife's share of the community income. *Poe* v. *Seaborn*, 282 U.S. 101 (1930); *Paul Cavanagh*, 42 B.T.A. 1037 (1940), affirmed on another issue, 125 F. 2d 366 (C.A. 9, 1942); * * * The following explanation given by this tribunal in the *Cavanagh* case, pages 1043 and 1044, adequately answers petitioner's contention:
>
> > The fact that under the California law the husband has a broad power of control does not detract from the wife's interest. This power is conferred upon him merely as the agent of the community and does not make him the owner of all the community property and income, nor negative the wife's present interest there as equal coowner. * * *

Although the *Harrold* case, *supra*, was reversed on factual grounds in *Harrold* v. *Commissioner*, 232 F. 2d 527 (C.A. 9th), the question whether an overpayment refundable to the husband was to be charged with taxes due from the wife was not considered by the Court of Appeals. The whole concept of community property is a legal fiction. It is no more fictitious to say that the wife

earned half the husband's salary by housekeeping than it is to say that each earned half the total income through [fol. 284] their own efforts. Once the law accepts the concept of two individuals each owning an equal half of the income and each individual files a separate return that is the end of it. Each party must be treated as an individual, as if they were not husband and wife. In *Harrold, supra*, the court in attempting to clarify this area of the law emphatically stated at page 629:

> • • • We subsequently emphasized in *H. B. Perine et al., supra*, that we could not require the respondent to do so, stating in part:
>
> > The spouses became separate and distinct taxpayers under the statute upon the filing of separate returns of the community income, and the situation is no different than it would be if the taxpayers were other than husband and wife. They being separate taxpayers, we lack authority to require the respondent to credit the proposed deficiency determined against the wife with an overpayment of tax by the husband. *Alexander Vayssie*, 8 B.T.A. 587. Cf. *John W. Preston*, 21 B.T.A. 840.

The defendant cites *Clayton* v. *United States*, 70 Ct. Cl. 740, cert. denied, 283 U.S. 860, and *Lattimore, et al.* v. *United States*, 82 Ct. Cl. 97, as supporting the allocation of an overpayment by one spouse to a deficiency of the other. However, in each of those cases the taxpayers originally filed a joint return, indicating that the amount paid with the joint return was intended to be applied to the tax liabilities of each. The defendant also relies on another decision of this court, *Santos* v. *United States*, No. 433—58, decided May 4, 1960, 277 F. 2d 806. The obvious distinction is in that case the law applicable was the Hawaiian Code which made the community property liable, not the California Code, and as the defendant points out in its brief:

> Legal rights, liabilities and interests of husband and wife are created by state law, and the Federal

revenue laws determine how the interests and liabilities as created shall be subject to income taxes. *Trapp* v. *United States*, 177 F. 2d 1 (C.A. 10th).

As a consequence of the above-stated reasons, we find that the defendant is not entitled to recover on its counterclaim.

This brings us to the last issue concerning plaintiff's liability for 1955. The Government concedes that the salaries of plaintiff from Jaunary 1, 1955 to October 25, [fol. 285] 1955, were community income to him and Dixie Gilmore at the time the divorce became final. Therefore, plaintiffs were required to include only one-half the income received during this period in their 1955 joint tax return. It should be mentioned in passing that the tax return of Dixie Gilmore for 1955 does not indicate a tax deficiency; in fact, there is an overassessment of $1,895.76, which the defendant might apply against Dixie Gilmore's tax deficiencies for 1953 and 1954.

It is so ordered.

DURFEE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Wilson Cowen, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiffs are and since November 1, 1955, have been husband and wife. They are citizens and residents of California.

2. From March 2, 1946 to October 25, 1955, plaintiff Don Gilmore was married to one Dixie Gilmore. During all of their marriage, Don Gilmore and Dixie Gilmore were residents of California.

3. On April 8, 1952, Don Gilmore and Dixie Gilmore were separated after six years, one month and six days of childless marriage. On April 10, 1952, Dixie Gilmore filed a complaint for divorce against Don Gilmore in the Superior Court of the State of California in and for the County of Marin, where the parties resided. On June 16,

1952, Don Gilmore filed an answer to this complaint and a cross-complaint for divorce against Dixie Gilmore. This action came to trial in due course in the Superior Court, commencing March 16, 1953, and continuing in order until April 24, 1953. The trial court found the issues in favor of Don Gilmore, denied Dixie Gilmore a divorce from Don Gilmore, and granted Don Gilmore an interlocutory judgment of divorce from Dixie Gilmore, wherein it decreed that there was no community property of the marriage, adjudged two residences to be joint tenancy property of the parties, and determined contrary to her claims that Dixie Gilmore had no community interest in [fol. 286] certain property, more specifically described hereafter, which stood of record as the separate property of Don Gilmore.

4. Dixie Gilmore appealed from this interlocutory judgment to the District Court of Appeal, State of California, First Appellate District. That court on April 26, 1955, entered its decision reversing the judgment below and ordering a new trial. Thereupon respondent Don Gilmore petitioned for a hearing of the appeal in the Supreme Court of the State of California. A hearing was granted in the case, and the decision of the District Court of Appeal was vacated by the Supreme Court, and the judgment of the trial court in all respects affirmed by it on September 23, 1955. The decision of the Supreme Court is reported at 45 Cal. 2d 142.

5. After the Supreme Court of California had affirmed the interlocutory judgment of divorce, a final judgment of divorce in favor of Don Gilmore and against Dixie Gilmore was entered in the Superior Court of the State of California in and for the County of Marin on October 25, 1955.

6. In his divorce litigation with Dixie Gilmore plaintiff Don Gilmore was represented at all times by Michael L. Haun, Esquire, of the California bar, and from the outset of the litigation until about March 13, 1953, also by Walter F. Freitas, Esquire, of the law firm of Freitas, Freitas & Allen. From January or February 1953, until the conclusion of this litigation, plaintiff Don Gilmore was also represented therein by Wallace S. Myers, Esquire, of

the law firm of Myers & Meehan. Dixie Gilmore's attorney's in said litigation from its inception until August 18, 1953, were Leslie C. Gillen, Esquire, and Charles A. Christin, Esquire. After that date and until the end of the litigation, her attorneys were James Martin MacInnis, Esquire, and Nicholas Alaga, Esquire.

7. When Dixie Gilmore commenced her action for a divorce against plaintiff Don Gilmore on April 10, 1952, and when that action was tried, Don Gilmore individually was the record owner of the following securities:

(a) 3,000 shares of the common stock of Don Gilmore—San Francisco, a California corporation, being 100 percent of the issued and outstanding stock of said corporation;

[fol. 287] (b) 1,500 shares of the common stock of Don Gilmore—Riverside, a California corporation, being 60 percent of the issued and outstanding stock of said corporation. The remaining shares of stock of this corporation were then owned by Thomas E. Brady and H. J. McCullough.

(c) 1,833 1/3 shares of the common stock of Don Gilmore—Hayward, a California corporation, being 73 1/3 percent of the issued and outstanding stock of said corporation. The remaining shares of stock of this corporation were then owned by C. N. Wilson and H. J. McCullough.

All of his stock interests in these corporations had been owned by Don Gilmore continuously since a date prior to his marriage to Dixie Gilmore.

8. For many years prior to the divorce litigation and during that litigation, Don Gilmore—San Francisco (a corporation), was engaged in the business of operating a franchised Chevrolet dealership for the retail sale and servicing of new and used automobiles and trucks in San Francisco, California. During the same period, Don Gilmore—Riverside (a corporation), carried on a like business as a franchised Pontiac dealership in Riverside, California, and Don Gilmore—Hayward (a corporation), carried on a like business as a franchised Chevrolet dealership in Hayward, California. Each of these businesses

operated under an annually renewable franchise contract with a division of General Motors Corporation; each franchise contract contained a clause giving the manufacturer the unilateral right to terminate the franchise on 90 days' notice.

9. For many years prior to the trial of the divorce action between Dixie Gilmore and himself, plaintiff Don Gilmore had been the president and principal managing officer of each of the three above-mentioned corporations. He had received the following combined gross salaries from them:

1949	$79,800.00
1950	61,316.65
1951	66,799.92
1952	66,799.92

10. In 1953, the year in which the divorce action was tried, Mr. Gilmore received salaries as president of the three corporations in the total combined amount of $66,799.92, broken down as follows:

[fol. 288]

San Francisco	$49,999.92
Hayward	10,800.00
Riverside	6,000.00

11. From his ownership of stock in the foregoing corporations Don Gilmore had received the following dividends in recent years prior to 1953:

1948	$109,484.80
1949	69,438.23
1950	50,663.48
1951	114,625.65
1952	73,044.00

In 1953 Don Gilmore received a dividend from Don Gilmore—San Francisco, in the amount of $39,657.02.

12. The only income of Don Gilmore from sources unrelated to these automobile dealerships for the years in suit was $1,024.90 in 1953, and $516.60 in 1954.

13. The salaries paid to Don Gilmore by three automobile dealerships, and particularly the large portion

thereof paid to him by Don Gilmore—San Francisco, were generous for the services he performed. He was paid these salaries only because of his controlling stock ownerships in these corporations. His salaries for corresponding positions would have to be greatly reduced if he were employed by corporations which he did not own outright or control.

14. Don Gilmore had spent all of his adult life in the retail automobile business. This was the only business he knew. In 1952 and 1953, he was 62 years of age, and too old to get another job as president or general manager of an automobile dealership, except through a controlling stock ownership interest.

15. Among the provisions of the automobile dealerships' franchise contracts was a Minimum Capital Standard Agreement, by which the manufacturer required each dealership to maintain a stated minimum of total owned capital. In the case of Don Gilmore—San Francisco, the total owned capital required by the Chevrolet Division of General Motors Corporation for the year commencing November 1, 1954, was $556,283. As of July 31, 1954, the total owned capital of that corporation was $626,486, all of which was owned by Don Gilmore individually.

16. The franchise contracts also provided that the General Motors Corporations could immediately terminate [fol. 289] the franchises by delivering to the dealer or his representative a written notice of termination in the event of:

> Any sale, transfer, relinquishment, voluntary or involuntary, by operation of law or otherwise, of any interest in the direct or indirect ownership or active management of dealership without the prior written approval.

17. Shortly after Don and Dixie Gilmore first separated about April 8, 1952, Mr. Haun, Mr. Gilmore's attorney, had one or two discussions with Mrs. Gilmore's attorney in an effort to determine whether there was a possibility of saving the marriage. However, it was soon evident that there was no possibility of a reconciliation, and no further efforts to save the marriage were made after April 15, 1952.

18. In May 1952, Don Gilmore had accepted the fact that his marriage to Dixie was beyond repair. He was willing to have a divorce granted to Dixie and to pay her a reasonable amount of alimony for a reasonable period. In principle, Dixie's demands that she should obtain the divorce and that she should receive an appropriate amount of alimony were acceptable to Don Gilmore and to his counsel.

19. At the time of his marriage to Dixie Gilmore in 1946, the value of Don Gilmore's stockholdings in the three automobile dealerships was approximately $200,000. At the time of their separation, the total value of these stockholdings had risen to approximately $800,000.

In 1952 and prior to the trial of the divorce suit, Michael Haun and, subsequently, Walter F. Freitas, as attorneys for Don Gilmore, had conferences with Messrs. Gillen and Christin, who represented Dixie Gilmore, in an effort to settle the litigation. In each of these conferences, Dixie's attorneys took the position that the increase of approximately $600,000 in the value of Don Gilmore's stockholdings was money earned by virtue of his personal services to the corporations and, therefore, was community property under the laws of California. On this basis, they contended that Dixie Gilmore was entitled to one-half of the value of the increase but stated that if Don Gilmore would pay Dixie Gilmore $275,000 in cash, she would accept that in full settlement of her claim. [fol. 290] During the divorce trial, Dixie Gilmore sought to recover $300,000 as her community share of the $600,000 increase in the value of the stock.

20. Don Gilmore rejected Dixie Gilmore's demands for a settlement payment of $275,000 for the following reasons:

(a) It would have been impossible for him to raise $275,000 in cash without selling a substantial portion of his stocks in the automobile dealerships. In the event of the sale of sufficient stock to raise that amount, his capital investment in the dealerships would have been reduced below the minimum capital standards required in his dealer franchise contracts, and he feared that such a

reduction would result in the cancellation of the franchises.

(b) Although Dixie Gilmore's attorneys stated that she would accept stock in lieu of cash in payment of the settlement, Don Gilmore feared that the General Motors Corporation would not accept Dixie Gilmore as a shareholder in the corporations and would cancel the franchise contracts pursuant to the contract provision quoted in finding 16.

(c) His attorneys advised Don Gilmore that any increase in the value of the separate property of a spouse as a result of his personal efforts or services during marriage was recognized by California law as community property, but that any increase in value of the stocks due to a return on the investment remained separate property. After examining his books and records, his attorneys further advised him that they had determined that during the marriage he had drawn salaries from the corporations in amounts which the attorneys felt were the maximum salaries that the Internal Revenue Service would recognize as reasonable compensation for managing officers of automobile dealerships and that all of the proceeds of the salaries had been spent by Don Gilmore and Dixie during their marriage. Accordingly, they advised him that any additional increment of value accruing to his shares of stock in the dealerships during the marriage was his separate property and not community property.

21. After the efforts to settle failed, the action went to trial in the Superior Court. The trial consumed a period of 24 days, and the reporter's transcript of the case consisted of 11 volumes containing 3,063 pages.

[fol. 291] 22. With respect to the issues before him, the trial judge made the following statement:

> The primary issue here, aside from the divorce itself, is the question of the evaluation and determination of the defendant's separate or community property first, most noteworthy the claim set forth by Mr. Gilmore and his counsel that the increase, balance sheet increase, the increase in net worth, that is, overall net worth of his interest in the agencies represented by his holdings.

23. The issue as to which party was entitled to be granted the divorce arose out of allegations by Dixie Gilmore that Don Gilmore was guilty of extreme cruelty and adultery and by the allegations of his cross-complaint that she had been guilty of a continuous course of misconduct that constituted extreme cruelty. The evidence, including the transcript of the evidence at the divorce trial, reflects that the major portion of the evidence presented by both parties and the time required for its presentation were devoted to the misconduct charges. A considerably smaller portion of the evidence related to the question of whether the increase in the value of Don Gilmore's stock was community property.

However, after Dixie Gilmore took the initiative in raising charges of misconduct on the part of Don Gilmore, his attorneys determined that it was necessary to resist these charges by extensive examination of Dixie Gilmore, by rebuttal evidence, and by evidence of misconduct on the part of Dixie Gilmore, for the following reasons:

(a) Under California law, the court must award more than 50 percent of the community property, and may award all of the community property to the innocent spouse in divorces based on extreme cruelty or adultery, the grounds alleged by Dixie Gilmore.

(b) The credibility of the parties became an important factor in the evaluation by the trial court of the entire case, including both the misconduct and community property issues. Don Gilmore's attorneys feared that if the trial judge believed Dixie's charges, he might also find that there was community property and award all or most of it to her.

(c) There was an issue as to whether oral declarations and conduct between the parties had affected the nature of the property in dispute.

[fol. 292] (d) Dixie Gilmore's charges of misconduct by Don Gilmore were published in the local newspapers. As a result, Don Gilmore feared that if the allegations were established and a divorce based on such charges was granted to Dixie Gilmore, the General Motors Corpora-

tion might cancel his dealership franchises. Although the evidence does not show whether or not his fears were justified, he and his attorneys felt it necessary to refute Dixie Gilmore's accusations and to [illegible] misconduct on her part.

24. In preparation for and during the trial of the divorce suit, Don Gilmore's attorneys devoted considerable effort in establishing that no portion of the increase in the value of his stock constituted community property. The most important evidence presented by Mr. Gilmore's attorneys on the community property issue consisted of (a) proof that the salaries paid him by the corporations in which he owned stock represented more than ample compensation for the services he rendered as an officer of these corporations, and (b) proof presented through a certified public accountant that the community obligations and expenses that had been paid during the marriage exceeded the salaries and other community income that Don Gilmore had earned during the marriage.

25. In addition to the principal issues described above, the questions of whether Dixie Gilmore was entitled to alimony and whether two houses in which the parties had lived were held in joint tenancy were also before the court in the divorce action. Before the trial began, Don Gilmore's attorneys anticipated that the court would direct the payment of alimony to Dixie Gilmore for a period of two or three years, since that had been the usual practice of many of the Superior Court judges in divorce actions where the marriages were of short duration. The evidence shows that little time and effort were devoted by Don Gilmore's attorneys on the alimony issue. Although there was a question as to whether two residences in which the parties had lived were held in joint tenancy, very little evidence was required to dispose of the matter, because the deeds to the properties were admitted in evidence and showed, as the court held, that the houses were in fact held in joint tenancy by Don and Dixie Gilmore.

[293] 26. As shown by the decision of the California Supreme Court in *Gilmore* v. *Gilmore*, 287 P. 2d 769, there were two methods which had been used by the Cali-

fornia courts in making an allocation between community and separate property. One method (the one urged by Dixie Gilmore's attorneys) for determining what part of an increase in the value of a business is community property is to subtract from the total increase a reasonable return on the value at the time of the marriage and treat the remainder as community property.

The other method—advocated by Don Gilmore's attorneys and adopted by the trial court—is to deduct from the total earnings of the business the value of the husband's services to it. The remainder, if any, represents the earnings attributable to the separate property invested in the business. The trial court's decision in this respect was affirmed by the California Supreme Court on the basis of the trial court's findings that Don Gilmore's corporations were staffed by well trained personnel who were capable of carrying on the businesses unassisted; that he worked relatively short hours and took many extended vacations; that the salaries he received, constituting community income, were more than ample compensation for the services he rendered, and that during the period involved there was a tremendous increase in the automobile business that was accompained by an increase in the value of dealer franchises.

27. After Dixie Gilmore appealed from the interlocutory decree rendered by the Superior Court, it was necessary for Michael L. Haun and Wallace S. Myers, as Don Gilmore's attorneys, to spend considerable effort, research, thought, and planning on the appellate proceedings and to write briefs and make arguments before the appellate courts during 1953, 1954, and 1955. A reversal of the trial court's decision or the granting of a new trial would have deprived their client of the success achieved at the trial.

28. During 1953 and 1954, Don Gilmore paid the following amounts for work or services rendered by his attorneys and others in connection with the divorce litigation:

[fol. 294]

1953

Michael L. Haun, attorney	$8,281.50
Walter F. Freitas, attorney	3,500.00
Wallace S. Myers, attorney	14,265.00
R. L. Schwerin, C.P.A.	1,500.00
Court reporters	4,990.65
Total	32,537.15

1954

Michael L. Haun, attorney	$5,250.00
Wallace S. Myers, attorney	2,000.00
Pernau-Walsh Printing Co. (briefs on appeal)	804.21
Court reporter	20.00
Total	8,074.21

(a) When Dixie Gilmore appealed from the interlocutory judgment, Don Gilmore was ordered by the trial court to pay for a transcript of the trial proceedings and paid the $4,990.65 listed above to two court reporters for their preparation of the transcript.

(b) In connection with the trial of the divorce action, Don Gilmore's attorneys retained on their client's behalf Robert Schwerin, a certified public accountant, who made an examination of Don Gilmore's books and prepared accounting schedules showing that the community expenses of Don and Dixie Gilmore during their marriage were greater than his salaries and other community income during the same period. The schedules were admitted in evidence in connection with Mr. Schwerin's testimony in the divorce suit. He was paid a fee of $1,500 for the services he rendered for Don Gilmore.

(c) Walter F. Freitas is an attorney who represented Don Gilmore after the divorce suit was filed, but he withdrew from the case shortly before it went to trial. He represented Mr. Gilmore in the negotiations for settlement and in the taking of depositions before the trial itself began. Don Gilmore paid him $3,500 for the legal services he rendered in this connection in 1953.

(d) Michael L. Haun served as Mr. Gilmore's attorney from date of the filing of the divorce action until the final judgment was entered after the decision of the California Supreme Court on appeal.

(e) Wallace S. Myers, an attorney, was employed by Mr. Gilmore to represent him about February 1953, after [fol. 295] the divorce suit was filed, and he continued with Mr. Haun to represent Mr. Gilmore thereafter throughout the trial and appeal of the case, until final judgment was entered.

(f) As indicated in the foregoing table, the sum of $804.21 was paid by Don Gilmore in 1954 to the Pernau-Walsh Printing Co. for printing briefs on the appeals from the interlocutory decree of divorce.

(g) Don Gilmore also paid $20 to a court reporter for services rendered in connection with the divorce litigation in 1954.

29. None of the three attorneys who represented Don Gilmore kept records in which he undertook to allocate what percentage of his time or efforts was devoted to each of the several issues involved in the divorce litigation. However, each of them testified that more than 80 percent of the legal services which they rendered and for which they were paid by Don Gilmore in 1953 and 1954 were directed toward preserving his stock in the three dealerships as his separate property and in defeating Dixie Gilmore's claim that she was entitled to one-half of the increment in the value of that stock that occurred during the marriage. The attorney who represented Dixie Gilmore in the appeals testified that he was unable to determine the percentage of effort that the attorneys for either side devoted to the several issues, because the factual issues regarding misconduct and community property merged and overlapped in view of the fact that the California law requires the court to award more than 50 percent of the community property to the innocent spouse in cases where a divorce decree is awarded on grounds of adultery or extreme cruelty.

If Dixie Gilmore had succeeded in obtaining the community interest she claimed in the stock of the automobile corporations and the dealership contracts held by Don Gilmore had been canceled because of his failure to maintain the minimum ownership of capital required by such contracts, he would have lost his positions and salaries as an officer of the corporations and, as stated in finding

14, he was too old at the time to get a similar position with other automobile dealers.

30. The evidence, particularly the facts set forth in finding 23, establishes that 80 percent or more of the [fol. 296] amounts which Don Gilmore paid to his attorneys and his accountant in 1953 and to his attorneys in 1954 were for services rendered by them to defeat Dixie Gilmore's claims to one-half of the value of the increase of his stock in the three dealership corporations, and to establish that no portion of such stock was community property.

31. (a) Don Gilmore timely filed his individual income tax return for the calendar year 1953 with the District Director of Internal Revenue at San Francisco. Mr. Gilmore reported a total tax liability of $18,209.86 and further reported that of this sum, $14,643 had been paid as income taxes withheld from his salaries by his employers and by excess F.I.C.A. tax payments. By this computation, there was a balance due of $3,566.86, which he paid with his return.

(b) His 1953 tax retrun reflected the following allocations of salaries received and taxes withheld:

INCOME:		*Don*	*Dixie*
Salaries:	*Total*	*Gilmore*	*Gilmore*
Don Gilmore, San Francisco	$49,999.92		
Don Gilmore, Hayward	10,800.00		
Don Gilmore, Riverside	6,000.00		
	66,799.92	$50,099.92	$16,700.00
Parties divorced.			
Community status through 7-1-53.			
Allocation of Withholding Tax:			
Don Gilmore, San Francisco	$15,000.00		
Don Gilmore, Hayward	3,240.00		
Don Gilmore, Riverside	1,176.00		
Excess F.I.C.A. Tax	108.00		
	19,524.00	14,643.00	4,881.00

(c) Among others, Don Gilmore took a deduction in his 1953 income tax return in the sum of $31,377.20 for "Costs of defending properties & investments. Legal fees and accounting costs".

(d) In his 1953 tax return, Mr. Gilmore also claimed deductions for the following taxes which he allocated as follows:

	Total	*Don Gilmore*	*Dixie Gilmore*
California income taxes	$5,643.10	$4,691.22	$951.88
Unemployment tax	30.00	22.50	7.50

[fol. 297] 32. (a) Don Gilmore timely filed his individual income tax return for the calendar year 1954 with the District Director of Internal Revenue at San Francisco, reporting a tax liability of $7,098.71, taxes withheld of $11,879.67, and an overpayment of income taxes for the year in the sum of $4,781.84.

(b) Among the deductions claimed in his 1954 return, was one in the sum of $6,499.37 for "Costs of defending properties and investments—legal fees".

(c) In the same return he also reported the payment and allocation of the following State income and unemployment taxes:

Taxes:	*Total*	*Don Gilmore*	*Dixie Gilmore*
State Income Tax	$1,492.84	$1,492.84	
State Income Tax additional—1950-51	982.11	491.06	$491.05
Unemployment tax	30.00	15.00	15.00

33. Upon an audit of Don Gilmore's 1953 and 1954 individual income tax returns, the Commissioner of Internal Revenue made a number of disallowances and adjustments, including the following:

(a) The principal disallowances resulted from the Commissioner's determination that the attorneys' fees, accountant's fee, court reporters' fees, and printing costs, which Don Gilmore paid in 1953 and 1954 in connection with the divorce action, were personal expenditures of

Don Gilmore and were not deductible under Section 24(a) of the 1939 Internal Revenue Code.

(b) The Commissioner determined that only $9,762, or one-half of the $19,524 income taxes withheld from Don Gilmore in 1953 should be credited to him, and this resulted in a finding by the Commissioner that $4,881 of the tax liability reported on the 1953 return of Don Gilmore had never been paid.

(c) The Commissioner of Internal Revenue also determined that of the $5,643.10, which Don Gilmore had paid in 1953 for State income and unemployment taxes, Mr. Gilmore was entitled to a credit in his return of only one-half, or $2,821.55, and that the balance was deductible by Dixie Gilmore.

(d) In his 1953 income tax return, Don Gilmore had erroneously reported that of the $66,799.92 of salaries [fol. 298] paid to him during that year, the amount of $50,099.92 was taxable to himself individually and the balance of $16,700 was taxable to Dixie Gilmore. The error caused his individual income for the year 1953 to be overstated by the amount of $16,699.96. This error was recognized by the Commissioner of Internal Revenue, who made an adjustment showing that only one-half of the total salaries paid were taxable to Don Gilmore individually.

34. As a result of various disallowances and adjustments (including some not now in dispute), the Commissioner assessed deficiencies in income taxes against Don Gilmore as follows:

Year	*Tax*	*Interest*	*Total*
1953	$18,883.26	$4,264.25	$23,147.51
1954	3,762.21	583.12	4,345.33

Such deficiencies in taxes were paid by Don Gilmore on November 15, 1957, and the interest thereon was paid November 27, 1957.

35. Don Gilmore and Sue Gilmore were married on November 1, 1955, and on April 15, 1956, they filed with the District Director of Internal Revenue at San Francisco their joint income tax return for the calendar year 1955, showing a tax liability of $10,137.52, claiming withholding tax and estimated tax credits of $22,203.21, and

asserting an overpayment of $12,065.69. In the return, the taxpayers requested that the overpayment be credited on their 1956 estimated income tax.

36. (a) In the 1955 tax return, Don and Sue Gilmore reported the following:

Employer:	*Wages, etc.*	*Income Tax Withheld*
Don Gilmore, San Francisco	$20,583.29	$7,583.29
Don Gilmore Hayward	16,800.00	6,126.00
Don Gilmore, Riverside	10,800.00	3,544.08
Excess FICA	.....	168.00
	48,183.29	17,421.37

This return includes all earnings of Don Gilmore during 1955 over which he had complete control, including any share thereof which Dixie Gilmore, his divorced wife, may possibly claim as her share of community income for the period January 1, 1955 to and including the date of the final decree of divorce in October 1955.

[fol. 299] (b) In the 1955 return, they also took a deduction of $4,236.66 for "Costs of defending properties and investments—Legal Fees."

(c) As shown by the above-quoted table, the taxpayers in their 1955 return claimed a credit for all taxes withheld from Don Gilmore's salaries in 1955, including the amount withheld prior to October 25, 1955, when the final decree of divorce was entered, as well as the taxes withheld between that date and the end of the calendar year.

37. Don Gilmore received the amount of $42,433.29 as salaries from his employers, Don Gilmore—San Francisco, a corporation, Don Gilmore—Hayward, a corporation, and Don Gilmore—Riverside, a corporation, after December 31, 1954 and prior to October 25, 1955.

In addition Don Gilmore received on October 31, 1955, the following amounts as salaries from his employers for the period from October 16, 1955 to October 31, 1955:

From Don Gilmore—Hayward, a corporation	$700.00
From Don Gilmore—Riverside, a corporation	450.00

In addition, Don Gilmore received the amount of $4,600 as salaries from his employers after October 31, 1955, and prior to January 31, 1956.

38. On the basis of the decision in *Waters* v. *Waters*, 170 P. 2d 494 and other authorities, it is the plaintiffs' position herein that all 1955 salaries earned by Don Gilmore prior to October 25, 1955, when the final decree of divorce was entered, were community income of Don Gilmore and Dixie Gilmore. Thus, according to plaintiffs' computation, the $42,433.29 which Don Gilmore earned as salaries from January 1 to October 16, 1955, was community income and that $718.75 of the $1,150 in salaries which he earned in the period from October 16, 1955 to October 31, 1955, is also community income of Don Gilmore and Dixie Gilmore. Plaintiffs' addition of the two amounts yields a total of $43,152.04 as the total 1955 community income of Don and Dixie Gilmore.

39. The taxpayer, Don Gilmore, filed a timely claim for refund of income taxes paid for the year 1953 on the following grounds:

[fol. 300] 1. 80% of expenses for legal fees of taxpayer's attorneys, and of other costs in divorce proceedings (except fees paid to attorneys for Dixie Gilmore), were incurred and paid during the taxable year for the conservation of the taxpayer's income-producing property. They are therefore deductible expenses. They were erroneously treated by the Commissioner as personal expenditures.

2. The Commissioner had erroneously credited to Dixie Gilmore, and refused to credit to the taxpayer, amounts of income tax withheld from the taxpayer's salary by his employer and which were deposited by taxpayer's employer to the taxpayer's credit with the District Director of Internal Revenue.

3. The Commissioner has erroneously allocated to Dixie Gilmore, and refused to allow as a deduction from the taxpayer's gross income, income taxes paid to the State of California by the taxpayer for his account and not for that of Dixie Gilmore, in the amount of $1,877.17.

4. The Commissioner has erroneously credited to Dixie Gilmore, and disallowed as an expense of the taxpayer, amounts of unemployment insurance tax

paid for the taxpayer's account to the State of California. These amounts were expenses of the taxpayer and were not paid for or expenses of Dixie Gilmore.

40. The taxpayer, Don Gilmore, filed a timely claim for refund of income taxes paid for the year 1954 on the following grounds:

> 80% of expenses for legal fees of taxpayer's attorneys, and of other costs in divorce proceedings, were incurred for the conservation of the taxpayer's income-producing property. They are therefore deductible. They were erroneously treated by the Commissioner as personal expenditures.

41. The taxpayers, Don and Sue Gilmore, filed a timely claim for refund of income taxes paid for the year 1955 on the following grounds:

> Don Gilmore was previously married to Dixie Gilmore, and this marriage was dissolved by a final decree of divorce effective Oct. 25, 1955. Wages, etc. paid to Don Gilmore between Jan. 1 and Oct. 25, 1955, were community income of Don Gilmore and Dixie Gilmore, of which one-half is taxable to Dixie Gilmore. The present taxpayers, Don and Sue Gilmore, erroneously reported all of such income as their community income, and are filing this claim to [fol. 301] eliminate from their gross income the portion thereof which is taxable to Dixie Gilmore.

42. More than 6 months had elapsed after the filing of the above-described claims for refund before this action was brought. No action had been taken by the Commissioner of Internal Revenue on the claims for refund by that time.

DEFENDANT'S COUNTERCLAIM

43. Defendant was granted permission to assert at the trial a counterclaim against Don Gilmore for each of the years 1953 and 1954 for unpaid income taxes assessed against Dixie Gilmore for those years. The counterclaim was filed December 15, 1959, and the allegations thereof were denied plaintiff Don Gilmore.

44. Shortly prior to June 19, 1957, an Internal Revenue agent prepared delinquent income tax returns for Dixie Gilmore for the years 1953 and 1954. The agent did not discuss the contents of the returns with Dixie Gilmore, but prepared such returns on the basis of a report made by another Internal Revenue agent who had examined the income tax returns of Don Gilmore for the years 1953 and 1954. After the returns for Dixie Gilmore had been prepared, they were mailed to her for signature, and on June 19, 1957, her then attorney delivered the returns, which had been signed by Dixie Gilmore, to the Internal Revenue Service and they were filed on that date.

The total tax liability reflected by the return for Dixie Gilmore for 1953 was $13,625.78. Against this liability a credit for income tax withheld in the amount of $9,762 was applied, leaving a balance of tax due in the amount of $3,863.78. On December 31, 1957, interest up to that date in the amount of $879.51 was assessed, making a total balance then due of $4,743.29.

The return for Dixie Gilmore for 1954 reflected a total tax liability of $11,958.59. A credit of $11,879.66 for income taxes withheld was applied, thus leaving a balance of $78.93 due for 1954 income taxes. On December 31, 1957, interest of $13.23 was assessed, making a total of $92.16 due as of that date.

[fol. 302] 45. A demand for the payment of the 1953 and 1954 income taxes and interest was first made on Dixie Gilmore on January 7, 1958, and on March 28, 1958, tax liens were filed against Dixie Gilmore for the unpaid income taxes, plus interest, in Napa County, California. The record does not show what additional attempts if any, have been made to collect such taxes from Dixie Gilmore.

46. Defendant's counterclaim is based on its contention that during the years 1953 and 1954, Don Gilmore, as the husband of Dixie Gilmore, had full and complete control of the community income and is liable for the unpaid income taxes of Dixie Gilmore, together with the interest due thereon.

47. The final judgment of divorce entered by the Superior Court of Marin County, California, on October

25, 1955, in *Dixie Gilmore* v. *Don Gilmore*, provided in part:

> It is Further Ordered, Adjudged and Decreed that there is no community property belonging to the parties hereto.

48. When the 1953 and 1954 individual income tax returns of Don Gilmore were reviewed and audited by the Internal Revenue Service (finding 33), the report of examination (Exhibit 21), stated that since the interlocutory decree of divorce of June 30, 1953, did not adjudicate community property income rights for the interlocutory period, salaries earned during the interlocutory period constituted community property income and that one-half of such income was legally the income of the taxpayer's former spouse, Dixie Gilmore. As shown in finding 33(d), the Internal Revenue Service adjusted Don Gilmore's 1953 return so as to show that only one-half of the total salaries he received that year was taxable to him individually.

49. On or about October 25, 1955, when the final decree of divorce was entered, the attorneys who represented Dixie Gilmore on appeal demanded an accounting of any accumulations of community property during the period between the interlocutory decree of June 30, 1953, and the final decree of October 25, 1955. It was established at that time that the community income during the period involved was considerably less than payments made by Don Gilmore for community expenses and obligations.

[fol. 303] Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and judgment will be entered to that effect.

The court further concludes as a matter of law that the defendant is not entitled to recover and, accordingly, its counterclaim is dismissed.

The amount of recovery will be determined pursuant to Rule 38(c), of the Rules of this court.

[fol. 304] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 305]

SUPREME COURT OF THE UNITED STATES

No. 255, October Term, 1961

UNITED STATES, PETITIONER

vs.

DON GILMORE ET AL.

ORDER ALLOWING CERTIORARI October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary calendar and set for argument immediately following Nos. 190 and 268.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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